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In The

Supreme Court of the United States

October Term, 1995

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

KARL W. GREEN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED

1. Should Railroad Retirement Act ("RRA"), 45 U.S.C. § 231 *et seq.*, disability benefits paid to injured railroad workers in lieu of wages be offset against their claims of lost wages in negligence actions filed against their employers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*?

The following question is encompassed within the immediately preceding question.

1a. Are RRA disability benefits subject to the collateral source rule in FELA actions when: (1) the defendants in those actions are required by federal law to contribute to the fund from which these disability benefits are paid; and (2) disallowing plaintiffs the double recovery of both damage awards for lost wages and RRA disability benefits for those same lost wages will not discourage workers from contributing to the RRA fund, since their contributions to the fund also are mandated by federal law?

In addition, this appeal would present the following questions:

2. Have railroad employers been denied equal protection within the Tenth Circuit Court of Appeals since that circuit court's opinion in this case disallowed an offset for RRA disability benefits, yet this circuit court in prior cases has permitted other defendants an offset for Social Security benefits?

3. Did the Tenth Circuit Court of Appeals err and misconstrue the United States Supreme Court's opinion in

Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963), by overturning a jury verdict of no negligence because of the admission of evidence of disability payments in mitigation of damages when, unlike *Tipton*, the evidence of disability payments was not related to the issue of liability and there was nothing in the record from which the appellate court could conclude that the evidence of disability benefits may have influenced the jury's deliberations concerning liability?

LIST OF PARTIES

There are no additional parties to this proceeding who do not appear in the caption of this case. However, The Denver & Rio Grande Western Railroad Company is a wholly owned subsidiary of Rio Grande Holding, Inc. which is a wholly owned subsidiary of Southern Pacific Rail Corporation. Some shares of Southern Pacific Rail Corporation are publicly traded. The Denver & Rio Grande Western Railroad Company also owns a portion of the capital stock of The Denver Union Terminal Railway Company and TTX Company.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Denver & Rio Grande Western Railroad Company ("D&RGW"), respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, pp. la-12a) is reported at 59 F.3d 1029 (10th Cir. 1995). That opinion reversed the judgment entered by the United States District Court for the District of

Utah on December 10, 1992 (App., *infra*, pp. 13a-14a), vacated the jury verdict of no negligence entered by the jury in its special verdict (App., *infra*, pp. 15a-16a), and remanded the case for a new trial.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion in this case on July 3, 1995. No rehearing or extension of the time to file a petition for a Writ of Certiorari has been sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and this petition is being filed within 90 days of July 3, 1995 as required by this Court's Rule 13.1.

STATUTE INVOLVED

This action is governed by the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*. Section 51 reads in pertinent part:[1]

> Every common carrier by railroad while engaged in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ..

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[1] The full text of the statute cited herein is set forth in Appendix D. (App., p. 17a.)

STATEMENT OF THE CASE

Respondent, Karl Green, was a railroad engineer. Mr. Green claimed he sustained permanent injuries when a train was moved by another engine while his engine was attached to the rear of the train. Jurisdiction was properly exercised by the United States District Court for the District of Utah pursuant to 45 U.S.C. § 56. Mr. Green's action was tried to a jury. The jury found there to be no negligence and the trial court entered a judgment against Mr. Green.

Before trial, Mr. Green filed a motion in limine to preclude D&RGW from making any reference or attempting to introduce evidence of disability pension benefits plaintiff was receiving from the Railroad Retirement Board, pursuant to the Railroad Retirement Act ("RRA").[2] (Aplt. App. 32-34.)[3] Mr. Green argued that RRA disability benefits were not admissible to offset his claim of lost wages because of this Court's decision in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963).[4] (Tr. 29-31, 35-36.) D&RGW responded that the railroad defendant in *Eichel* conceded this point and thus the issue was never briefed nor argued before the Supreme Court. (Tr. 31, 38.) D&RGW further argued that there was no Tenth Circuit decision directly on point but that the Tenth Circuit

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[2] There is no dispute that D&RGW in fact contributed to that fund as it was required to do by federal law. *See* 26 U.S.C. § 3221 (a) and (b).

[3] The record has not been transmitted to this Court at this time. Nevertheless, D&RGW cites to the record that was before the Tenth Circuit, as allowed by Rule 12.7, in order to support the factual statements herein made. Where quotes of the trial court are cited, the entire statement of the trial court is included in Appendix E to this petition.

[4] This opinion is reprinted herein as Appendix F.

had held it within a trial court's discretion to allow Social Security benefits as an offset to lost wage claims filed against an employer in a discrimination case. (Aplee. Supp. App. 4-5, and Tr. 32-33 (citing the trial court to *EEOC v. Wyoming Retirement System,* 771 F.2d 1425 (10th Cir. 1985)).) Railroad workers are not covered by Social Security and instead are covered by the Railroad Retirement Act and D&RGW argued there was no reason why courts should treat RRA benefits differently than Social Security benefits when the defendant is the plaintiff's employer. (*Id.*) Initially, the district court indicated that the statements of the *Eichel* Court seemed to clearly disallow an offset, but took the matter under advisement. (Tr. 35-38.)

The next day, the district court ruled that it would result in D&RGW paying twice for Mr. Green's lost wages if Mr. Green's damages were not reduced by the amount of his disability payments, and that these benefits were not covered by the collateral source rule, since D&RGW had contributed to the fund from which these payments were made. (Tr. 156-58.) The district court judge so ruled after stating that he had independently researched the collateral source rule. He also stated that he did not "think that the Tenth Circuit or the Supreme Court, if it gets to them, will have a contrary point of view." The trial court concluded that the statement in *Eichel* was dicta, and following precedent of the Tenth Circuit regarding its construction of the collateral source rule in other contexts, the district court exercised its discretion to allow the offset. (Tr. 159; app., *infra*, p. 21a.)

The district court, without objection from D&RGW, further ruled that it would be preferable not to inform the jury of the fact that Mr. Green was receiving disability benefits. The

district court strongly directed Mr. Green to present to the jury only his net damages for lost wages and benefits after deducting the disability benefits. "[T]hen the jury never hears about it [the fact that Mr. Green was receiving disability benefits] . . .." (Tr. 157; app., *infra*, p. 19a.) The district court's ruling permitted D&RGW to present evidence to support a deduction for disability payments only if Mr. Green presented damage evidence to the jury without the deduction. The district judge stated to Mr. Green's counsel, ". . . it would be preferable to not bring it up at all because we would eliminate any Rule 403 problems of confusion and unfair prejudice and so on. But I'll leave it up to you." (Tr. 159; app., *infra*, pp. 20a-21a.)

Mr. Green did not follow the district court's direction. Rather, Mr. Green, through his economist, first presented what he claimed to be his total economic damages, including damages for loss of future wages and reduced RRA retirement benefits. Mr. Green's economist then informed the jury that Mr. Green was receiving RRA disability benefits, which he then deducted from the prior computation of total economic damages in front of the jury. (Tr. 459-69.) Defense counsel did not present to the jury the fact that Mr. Green was receiving disability benefits and did not mention this fact in either opening statement or closing argument. (Tr. 89-108; 1242-68.)

Following the jury's finding of no negligence and the district court's entry of judgment for D&RGW, Mr. Green appealed the issue of whether the district court erred in its ruling that RRA disability payments were not a collateral source and should be considered in mitigation of Mr. Green's lost wages and reduced retirement benefits. Mr. Green also claimed on appeal that the error was reversible although he, not the D&RGW, introduced into evidence at trial the fact that he was

receiving disability benefits.

The United States Court of Appeals for the Tenth Circuit held in favor of Mr. Green and ordered a remand of this case for a new trial. The Tenth Circuit did not fully consider the applicability of the collateral source rule or the facts regarding the presentation of the disability benefits by Mr. Green. Believing that it was compelled to disallow an offset merely because of the *Eichel* decision, the Tenth Circuit concluded that the district court abused its discretion. Without any consideration of the particular facts of the case, the Tenth Circuit also held that the error required reversal of the no negligence verdict. Certiorari is sought for this Court to review the opinion of the Tenth Circuit for correctness in light of the collateral source rule and the applicable standard for appellate review of a trial court's discretion in evidentiary matters. This petition involves important issues regarding this Court's supervision over federal courts, important issues of federal law which only this Court can now decide and a denial of equal protection by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS IS THE ONLY WAY ISSUES RAISED BY THIS PETITION CAN BE FULLY HEARD AND DETERMINED SINCE THE LOWER COURTS DEEM THEMSELVES COMPELLED TO FOLLOW THIS COURT'S DICTA IN *EICHEL* EVEN THOUGH THESE ISSUES WERE NOT ARGUED NOR FULLY ANALYZED IN *EICHEL*.

This petition seeks an appeal of a question of substantial economic importance to the railroad industry. Should RRA disability benefits paid to injured railroad workers in lieu of wages be offset against claims of lost wages in negligence actions filed by railroad workers against their railroad employers? Although this Court, in *dicta*, has approved a railroad's decision not to attempt an offset for disability benefits under similar circumstances, it is clear that this issue never has been addressed nor argued by parties before this Court. Moreover, because of this Court's *dicta,* the circuit courts also have failed to analyze this issue.

RRA benefits are similar to Social Security. Both railroad employers and their employees contribute to a fund from which RRA benefits are paid. However, under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), a disabled railroad worker often sues his railroad employer for negligently causing the accident which produced the disability. This often results in a double recovery. The disabled worker receives a damage award against his or her employer for lost wages, including lost future wages, while at the same time he or she continues to receive disability payments for those same lost wages from a fund to which the same railroad employer contributed.

Railroads have paid these double recoveries for at least the last thirty-two years because of *dicta* in this Court's 1963 *per curiam* decision in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963). The lower courts of this country have deemed themselves compelled to follow *Eichel* because of the following statement from that opinion:

> Respondent [defendant railroad] *does not*

> *dispute* that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner.

Id. at 254, emphasis added. (App., p. 23a.)

It is clear from the above quoted statement that the *Eichel* Court believed RRA disability payments were subject to the collateral source rule. It also is clear that this issue, which is now squarely presented by this petition, was not briefed, argued nor otherwise analyzed by the parties in *Eichel*. The railroad defendant in *Eichel*, for whatever reason, conceded the point now raised by this petition. The *Eichel* Court thus could not have properly and fully considered whether RRA disability payments really are from a source collateral to the defendant when the defendant contributes to the fund from which the payments are made. The *Eichel* Court did not analyze the collateral source rule under the facts of that case,[5] nor did it offer any reasons to support its apparent approval of the fact that the railroad in that case conceded the point now in issue.

Nevertheless, because of *Eichel*, circuit courts will not carefully consider this issue. Rather, they merely follow *Eichel*. They have disallowed any offset for RRA benefits received by plaintiffs without any independent analysis of whether such payments really are collateral to the defendant railroads, or whether the public policy which underpins the judicially created collateral source rule is being served by disallowing this offset. Without any meaningful analysis, the circuit courts simply cite *Eichel* and then rule that RRA benefits are inadmissible. *E.g.*, *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059 (6th Cir. 1984); *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649 (9th Cir. 1980). *Cf.*

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[5] The collateral source rule is discussed in detail in Point II.

Vanskike v. ACF Indus., Inc., 665 F.2d 188, 200 (8th Cir. 1981)(states that *Eichel* requires a stricter rule of *per se* inadmissibility in FELA cases), *cert. denied*, 455 U.S. 1000 (1982); *LaMade v. Wilson*, 513 F.2d 1348, 1350 (D.C. Cir. 1975)(relying on *Eichel*, holds that admission of receipt of collateral social insurance benefits is *per se* reversible error).

The *Eichel* Court did quote with approval the following language from the First Circuit opinion in *New York, New Haven & Hartford Railroad v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953):

> The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers . . . The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer.

Eichel at 254, emphasis added. (App., p. 23a.)

From this language, it could be argued that the *Eichel* Court adopted the reasoning of the First Circuit in *Leary* with respect to the issue now presented by this petition. This cannot be the case, however, because the *Leary* opinion also did not analyze the applicability of the collateral source rule to RRA disability benefits.

The language from *Leary,* that is quoted in *Eichel*, appears in a discussion of whether RRA disability benefits could offset damages under Section 55 of the FELA (45 U.S.C. § 55), not whether they were subject to the collateral source rule. Section 55 expressly provides offsets in FELA actions for certain

sums *contributed* by defendant employers. The *Leary* court merely held that RRA *benefits* were not within the scope of the offsets authorized by Section 55, and in passing merely stated that the railroad's "argument falls under the familiar principle that payments received by a plaintiff from a collateral source are not in mitigation of damages." *Leary* at 468. While the *Leary* court clearly concluded RRA *benefits* were not *contributions* under Section 55, it also clearly did not analyze the applicability of the collateral source rule to these benefits. Whether or not Congress expressly provided an offset when it enacted Section 55 does not determine the issue now presented. Federal common law requires offsets to prevent double recoveries unless the benefits are subject to the collateral source rule.

As a consequence of *Eichel*, all railroads are denied an offset for disability benefits paid to their employees under the RRA even though they have contributed to the fund from which the benefits are paid. Railroad employers are denied this offset not because these payments have been determined, through the adversary process, to be from a collateral source and are subject to the collateral source rule. They are denied this right simply because the railroad defendant in *Eichel* conceded this point, and the *Eichel* Court, without any analysis, agreed.

The right to an offset is being denied to all railroads without the opportunity for railroads to present the basis for the offset through the adversarial process. In this case, the trial court allowed the adversarial process to work. The trial court carefully considered this issue, conducted independent research of the collateral source rule, and analyzed the reasons for and against the admissibility of these benefits. The trial judge was in the best position to weigh the potential prejudice of this evidence and he even suggested a way to eliminate the

possibility of any prejudice. (See Statement of the Case, *supra*, p. 4-5.) Nevertheless, the trial court's decision was reversed, not because the Tenth Circuit determined the lower court's analysis was flawed, nor because reasons offered by Mr. Green persuaded the appellate court to reach a contrary conclusion. The trial court was reversed simply because the Tenth Circuit believed the *Eichel* decision required the reversal. (App., pp. 8a-9a.)

Since *Eichel*, railroads have continued to pay double recoveries to disabled workers without any court really considering whether this promotes any public policy or is otherwise justifiable. Whether or not RRA disability benefits are subject to the collateral source rule is something which should be fully briefed, argued and carefully considered. Because of *Eichel*, this can be accomplished only by this Court granting certiorari on this issue.

II.

RAILROAD RETIREMENT ACT BENEFITS DO NOT FALL WITHIN THE COLLATERAL SOURCE RULE IN FELA CASES AND THE PUBLIC POLICY REASON FOR THE COLLATERAL SOURCE RULE IS NOT FURTHERED BY DENYING AN OFFSET FOR THESE BENEFITS.

If this Court would grant certiorari to review the issue that was conceded in *Eichel*, it is likely that this Court would overturn its *dicta* in that opinion and affirmatively allow railroads the right to offset in FELA cases the amount of disability benefits received by the plaintiff employees. Such a result would be the only one consistent with the manner in which

the collateral source rule is applied in other contexts. A review of the applicability of the collateral source rule in FELA cases to RRA benefits also is important because the underlying policy objectives of that rule are not furthered in this context.

In the case of *Propeller Monticello v. Mollison*, 15 U.S. (17 How.) 152 (1854), this Court first ruled that a defendant could not avail itself of the fact that the claimant received satisfaction of its damages from its own insurer. This rule of law became known as the "collateral source rule" and has been defined as follows:

> [I]f an injured person receives compensation for his injuries from a source *wholly independent of the tort-feasor*, the payment should not be deducted from the damages which he otherwise would collect from the tort-feasor.

BLACK'S LAW DICTIONARY 262 (6th ed. 1990)(emphasis added).

The Tenth Circuit has articulated the collateral source rule in a similar fashion. In *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986), it stated:

> Colorado courts have interpreted the collateral source rule to provide that "compensation or indemnity received by an injured party from a collateral source, *wholly independent of the wrongdoer and to which he has not contributed,* will not diminish the damage otherwise recoverable from the wrongdoer."

Id. at 977 (quoting *Kisler v. Holsey*, 173 Colo. 540, 545, 481

P.2d 722, 724 (Colo. 1971))(emphasis added).

The *Mays* language is consistent with other Tenth Circuit definitions of the collateral source rule. *See Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1171 (10th Cir. 1986) (quoting D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.10, at 581 (1973)(collateral source is compensation by some source independent of the tortfeasor)); *Steckler v. United States*, 549 F.2d 1372, 1379 (10th Cir. 1977)(same definition as in *Mays*).

Under the generally accepted test set forth above, the disability benefits received by Mr. Green in this case cannot be found to be from a collateral source. Those benefits were not from a source "wholly independent" of D&RGW and "to which [it] did not contribute." D&RGW, as it was required to do by federal law, paid a substantial amount of money into the fund from which the disability payments were made. Those disability payments, therefore, were not from a collateral source, as the district court concluded. By disallowing an offset, the Tenth Circuit is allowing Mr. Green to recover twice from the D&RGW. The collateral source rule was not created to make a tortfeasor pay twice for the same loss.

In 1854, when this Court first recognized the collateral source rule, the rule favored providing a windfall to plaintiffs in order not to discourage the acquisition of insurance by individuals who would lose the benefit of their insurance should the insurance benefit be offset against damages. In this case, the policy objective of encouraging the purchase of insurance which forms the basis for the rule is not applicable. Neither railroad employers nor their employees obtain insurance because RRA benefits are not offset against damages. Likewise,

allowing this offset will have no effect upon the employer and employee contributions to the RRA fund. These contributions and their amounts are mandated by federal law. Thus, the public policy reason for the collateral source rule is not furthered by denying railroads an offset for RRA disability benefits in FELA cases.

Applying the collateral source rule to RRA benefits provides windfalls to plaintiffs without protecting any interests of those plaintiffs or of society. Moreover, any rationale for a rule that only promotes punitive action against defendants is improper under a negligence tort system, including the FELA. The FELA promotes compensating plaintiffs, not punishing defendants. *See, e.g., Wildman v. Burlington N.R.R.*, 825 F.2d 1392, 1395 (9th Cir. 1987)(punitive damages are unavailable under the FELA); *Kozan v. Chesapeake & O. Ry.*, 449 F.2d 1238, 1243 (6th Cir. 1971)(same).

Recently, the collateral source rule has come under well reasoned attack by legal scholars.[6] This is because of the dramatic change in our society since the collateral source rule

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[6] Goldsmith, *A Summary of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J.AIRL.&COM. 799 (Spring, 1988); McDowell, *The Collateral Source Rule-The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205 (1985); O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, LAW FORUM, Vol. 1979, No. 3; *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1963-64); *Cf.* S. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW, 79 and 174-76 (1989)(collateral source rule should be applied where the funds are derived from private savings and other forms of family income and wealth, but should not be applied where the losses are covered by social security, worker's compensation, employment related health care plans, private pension plans and group disability insurance).

was judicially created in the mid 1800's. Encouraging citizens to obtain insurance was and probably still is an admirable public policy objective for courts to recognize. However, since the creation of the collateral source rule, programs other than insurance to lessen the impact of catastrophic losses of income have burgeoned. Collective bargaining agreements, pension plans, 401 K plans, cafeteria plans, Social Security, Medicaid, state and federal welfare and charities all now address a potential plaintiff's loss of wages caused by a tortfeasor. Few, if any, of these programs were contemplated at the time the collateral source rule was judicially created. Consequently, for compelling policy reasons, state courts and most state legislatures have either abolished or limited the scope of the collateral source rule.[7]

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[7] *Id. See also Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979)("We refuse to join those courts which, without consideration of the facts of each case, blindly adhere to the 'collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant'"). Following the reasoning of the Supreme Court of Illinois, the Supreme Court of Florida also has stated:

> We believe that the common-law collateral source rule should be limited to those benefits earned in some way by the plaintiff. Governmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care. Keeping such evidence from the jury may provide an undeserved and unnecessary windfall to the plaintiff.

Florida Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514, 515 (Fla. 1984).

This attack on the policies and effect of this rule also has been recognized, but not acted upon, by federal courts in the context of the FELA. *See Reed v. Philadelphia B. & N.E. R.R.*, 939 F.2d 128, 134 (3rd Cir. 1991).

This Court never really considered whether RRA disability benefits are subject to the collateral source rule. Even if it had carefully considered this issue when *Eichel* was decided, it would be appropriate to reconsider it some thirty-two years later. In light of today's differing economic circumstances, the continuing validity or scope of the collateral source rule is an important question affecting both federal cases and state cases that involve federal questions, such as those brought in state courts under the FELA. This important question will be resolved only it is resolved by this Court.

III.

THIS COURT SHOULD CORRECT THE INEQUALITY IN THE APPLICATION OF THE COLLATERAL SOURCE RULE BY THE TENTH CIRCUIT.

Certiorari also should be granted in this instance because prior holdings of the Tenth Circuit are contrary to the holding in this action. Railroad employers now have been treated differently by the Tenth Circuit than other defendants, including employer defendants, with respect to the applicability of the collateral source rule to virtually identical federally mandated benefit programs. The scope and applicability of the collateral source rule, therefore, should be explained by this Court in order to avoid inconsistency in federal court decisions.

The admission of evidence of Social Security and other federal benefits to mitigate damages consistently has been approved by the Tenth Circuit whenever a nonrailroad defendant contributed to the funds from which the benefits were paid.

Starting in 1952, the Tenth Circuit held in *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952), that it was reversible error for the trial court to refuse to deduct disability benefits from the plaintiff's damages in a Federal Tort Claims Act case where the defendant, in that case the government, funded the account from which the payments were made. *Id.* at 244. Subsequently, in *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977), an appeal was brought after the trial court offset the plaintiff's damages in a Federal Tort Claims Act case by the amount of Social Security and veteran's benefits the plaintiff was receiving because of his injury. Relying on *Gray*, the Tenth Circuit upheld the reduction in damages, since some portion of the benefits were funded by the defendant (government), and merely remanded the matter in order to give the plaintiff an opportunity to reduce the amount of the offset by what he could prove was paid into the Social Security fund from his own contributions. *Id.* at 1379.

The Tenth Circuit's position with respect to this matter has remained clear and consistent, until now. *See Mays v. United States*, 806 F.2d 976 (10th Cir. 1986)(Civilian Health and Medical Program of the Uniformed Services benefits were "not from a source collateral to the United States," the defendant responsible for the plaintiff's damages, and the deduction was allowed), *cert. denied*, 482 U.S. 913, 977 (1987); *Berg v. United States*, 806 F.2d 978, 984-86 (10th Cir. 1986)(Medicare benefits funded by *employee* and *employer* taxes are a collateral source that is not deducted from damages awarded against the United States as a defendant, since no contributions from the defendant United States were identified).

The propriety of deducting Social Security benefits from lost wage claims against a nonrailroad employer was directly

before the Tenth Circuit in *EEOC v. Wyoming Retirement Systems*, 771 F.2d 1425, 1431-32 (10th Cir. 1985). The facts of *EEOC* cannot be logically distinguished from the facts of this case. In *EEOC*, the State of Wyoming had passed legislation which provided that state employees over the age of 65 could only continue in their state employment if they applied for and received yearly extensions. The EEOC sued the state for age discrimination on behalf of six employees who were terminated after they turned 65. The trial court found for the retired workers and awarded them their lost wages. However, the trial court deducted from the award the Social Security retirement benefits the claimants had received following their wrongful retirement, noting that they would not have received these benefits had they continued working.

This is precisely the scenario presented in this case. Railroad workers are not covered by Social Security. Rather, they are covered by the Railroad Retirement Act and both they and their employers contribute to RRA funding just as the State of Wyoming and its employees contributed to the Social Security plan in the *EEOC* case. RRA benefits are paid to railroad workers in lieu of Social Security benefits. Just as in *EEOC*, the claimant in this case, Mr. Green, would not have received the benefits at issue had he continued working for the defendant. In *EEOC*, the Tenth Circuit held it was within the trial court's discretion to deduct Social Security benefits from an award of lost wages against the claimant's employer, but now has denied that same right to a railroad employer defendant.

The only distinction offered by the Tenth Circuit for this discrimination against a railroad employer is that in *EEOC* "the state was a party and tax funds were at stake." (App., *infra*, p. 7a, quoting *EEOC*, 771 F.2d at 1431-32.) Whether a tortfeasor's

funds come from business revenues or taxes is hardly a reason to allow one and not the other to offset benefits against lost wages. Stated differently, why should wronged railroad workers enjoy double recoveries that this "distinction" denies to wronged government workers? The Tenth Circuit might just as well "distinguish" this case from the *EEOC* case because the names in the caption are different.

Even if this were a logical basis to distinguish this case from *EEOC*, this "distinction" is illusory. The very same taxpayers whom this "distinction" attempts to protect pay higher prices for shipped goods if the cost of operating railroads is higher. Increasing the cost of operating railroads by paying windfalls to injured railroad workers ultimately impacts the public in the same manner that paying windfalls to injured government workers would. Taxpayers' pocketbooks are effected both by higher taxes and when they pay more for food, fuel and building materials.

The Tenth Circuit cited to its other decisions in its opinion and obviously was aware of the unequal manner in which it was treating railroad employers. However, for the reasons discussed in Point I, the Tenth Circuit believed it was compelled to follow *Eichel* in this case. The Tenth Circuit stated:

> If there is confusion in our cases it is unimportant, because we believe Supreme Court precedent controls this issue. As plaintiff asserts, *Eichel v. New York Central RR*, 375 U.S. 253 (1963), compels the conclusion that the collateral source rule prohibits admission of RRA disability benefits in a FELA case.

(App., *infra*, p. 8a.)

The Tenth Circuit's allegiance to *Eichel* deprives railroad defendants of equal protection of the laws. In this case, the discrimination is imposed not by the state but by the Tenth Circuit. Our federal courts are supposed to insure equal protection, not be the source of its denial. Even more astounding is the fact that the Tenth Circuit felt compelled to treat railroad defendants differently than it had previously treated other defendants because of Supreme Court *dicta*.

There is nothing in the *Eichel* decision, nor the Tenth Circuit's opinion in this case, to support any rational basis for a discriminatory application of the collateral source rule in order to achieve some legitimate interest of the United States. Hence, the discrimination which now exists by reason of these contrary decisions in the Tenth Circuit would not even pass the most permissive standard of review used to test constitutional equal protection. *See McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961). Without the *dicta* in *Eichel*, it must be acknowledged that there is no reason to treat railroad employers differently than other employers, and *Eichel* offers no reason to justify this discrimination.

This Court should accept this appeal in order to establish uniformity and prevent discrimination in the application of the collateral source rule in cases subject to federal law. As discussed in Point I, lower courts, including the Tenth Circuit in this case, deem themselves compelled to follow the *dicta* of this Court in *Eichel*, even to the point of discriminating against railroad employers. Railroads are entitled to equal protection under the law. This appeal is necessary to provide this protection not only to D&RGW in this case but to all railroad employers in this country.

IV.

THIS COURT SHOULD CORRECT THE INCONSISTENCY BY WHICH REVERSIBLE ERROR HAS BEEN DETERMINED.

This case was submitted to the jury by means of a special verdict form which did not require the jurors to consider damages if they found no negligence. The jury found the D&RGW to have not been negligent and, in accordance with the trial court's instructions, returned the special verdict with the damage questions unanswered. The evidence of Mr. Green's disability benefits only was relevant to the issue of damages, which was an issue the jury never determined. Even if it was error to admit into evidence Mr. Green's disability payments, the Tenth Circuit should have carefully considered whether or not the error was harmless.

The Tenth Circuit determined that the trial court's decision to reduce plaintiff's lost wages by the amount of his disability benefits was reversible error because other "circuits have addressed this issue and determined that the admission of collateral source payments was not harmless." (App., *infra*, p. 9a.) Hence, the Tenth Circuit simply concluded that the admission of such evidence required a new trial, even though there is no reason to assume the jury ever considered this evidence. (*Id.*, pp. 10a-11a.) This conclusion, which was made without any analysis of the facts or the potential for misuse by the jury, is far from the accepted course of judicial proceedings. Moreover, it is inconsistent with the Tenth Circuit's own decisions in other cases, the decisions of other circuits, and the decisions of this Court.

All FELA cases that have considered this same issue have relied for support on *Eichel v. New York Central Railroad,* 375 U.S. 256 (1963), which in turn cites to *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963) as an example of the "likelihood" of prejudicial harm. *Eichel*, 375 U.S. at 253-56. The *Tipton* Court reversed the trial court's allowing such evidence because under the facts then before it, the admission could not be regarded as harmless. *Tipton*, 375 U.S. at 35. The facts which led this Court in *Tipton* to find reversible error, included the defendant pressing upon the jury the evidence of such collateral benefits for the very purpose of persuading the jury to find in defendant's favor on the issue of liability. *Id.* at 35 and 37. Thus, the error in admitting this evidence was found to necessitate a new trial on the issue of liability.

Although many courts have cited to *Eichel* and *Tipton* as support for a strict rule that admission of collateral source payments is prejudicial, that rule cannot be found in *Eichel* or *Tipton. Eichel* cited to *Tipton* as mere support for its reasoning that a trial court's exclusion of evidence of such payments should be upheld. *Eichel* cannot stand for the proposition that the admission of collateral source benefits is always prejudicial, since in *Eichel* the trial court excluded this evidence.[8]

In *Tipton*, unlike the facts of the instant case, the admission of the evidence was held to be prejudicial because it

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[8] In its exuberance to follow *Eichel*, the Tenth Circuit also erred by reasoning that the dicta in *Eichel* was "necessary to the holding that admission of evidence of those payments to prove malingering was not harmless." (App., *infra*, p. 9a.) *Eichel* only holds that if one concedes RRA benefits are subject to the collateral source rule, the potential probative value of these benefits to the issue of malingering is outweighed by the potential of prejudice, since other evidence of malingering would be more probative. *Eichel* at 255. (App., *infra*, p. 24a.)

was unfairly emphasized and it was pressed upon the jury for the purpose of influencing the jury to find no liability, not merely to reduce damages. In *Tipton*, the issue was whether the plaintiff was a seaman so as to be covered by the Jones Act, 45 U.S.C. § 688. The defendant offered evidence of the plaintiff's receipt of benefits under the Longshoremens' and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, to prove that the plaintiff was covered by that Act and was not a seaman covered by the Jones Act. *Tipton*, 375 U.S. at 34-35. The evidence of the plaintiff's receipt of collateral benefits not available to workers covered by the Jones Act clearly had the potential of influencing the jury's verdict that the defendant in *Tipton* was not liable under the Jones Act.

The holdings of this Court do no more than support upholding a trial court's discretionary *exclusion* of evidence of the plaintiff's receipt of collateral benefits, and further require reversible error for its *admission* where the evidence was presented on the issue of liability and "the jury was led to place undue emphasis on [such evidence] in determining the ultimate question of [liability]." *Id.* at 37. The decisions of this Court do not require a finding of prejudice whenever a trial court admits into evidence the fact that the plaintiff is receiving disability benefits.

The decisions of the circuit courts relied upon by the Tenth Circuit are in accord with the principle that mere admission of such evidence does not create reversible error. Any such error is reversible only when the facts of the particular case support the conclusion that such evidence indeed constituted error that was prejudicial. In *Phillips v. Western Co. of North America*, 953 F.2d 923, 930 (5th Cir. 1992), reversible error was found where the defendant "repeatedly

alluded to the benefits in his closing statement in an effort to bring the possibility of double recovery to the jury's attention." In *Reed v. Philadelphia, Bethlehem & New England Railroad*, 939 F.2d 128, 133 (3rd Cir. 1991), reversible error was found where the defendant discussed in closing argument the fact that the plaintiff was receiving disability payments, although there was no supporting evidence in the record. In *Wilcox v. Clinchfield Railroad*, 747 F.2d 1059, 1060-61 (6th Cir. 1984), reversible error was found where after two days of jury deliberations, the court informed the jury without the knowledge of the plaintiff's counsel that the plaintiff had received payment for medical expenses and lost wages, after which a no negligence verdict was promptly returned. In *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 651 (9th Cir. 1980), reversible error was found where the defendant solicited evidence of plaintiff's receipt of disability benefits and later discussed such benefits in closing argument.

In other cases, the Tenth Circuit has recognized that a trial court's admission of evidence is a matter committed to the discretion of the trial court, and that the trial court's discretion may not be disturbed on appeal absent a showing of clear abuse. *E.g., Motive Parts Warehouse v. Facet Enter.*, 774 F.2d 380, 396 (10th Cir. 1985).[9] If upon a showing of clear abuse of discretion there is determined to be error in the admission of evidence, a jury verdict will be set aside only if that error

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[9] The Tenth Circuit's departure in the instant action from the normal course of reviewing the trial court's exercise of discretion in such matters also infringes on Rule 403 of the Federal Rules of Evidence. To the extent the Tenth Circuit or any other court relies on the 1963 cases of *Eichel* and *Tipton* for support that a stricter rule of prejudicial error applies in FELA cases or in the context of the admission of evidence of disability benefits, that notion clearly is superseded by the Federal Rules of Evidence. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S.Ct. 2786 (1993).

prejudicially affected a substantial right of the complaining party. *Id.*

In *Higgins v. Martin Marietta Corp.*, 752 F.2d 492 (10th Cir. 1985), the Tenth Circuit specifically recognized that under certain facts admission of the plaintiff's receipt of collateral benefits may not be prejudicial. In *Higgins*, even though such evidence was admitted, the judgment for the defendant was affirmed because the court gave a limiting instruction to the jury. *Id.* at 498. Other circumstances also may render any evidentiary error harmless. *See, e.g., Mercer v. Theriot,* 377 U.S. 152, 154 (1964)(party cannot claim harm for own elicitation of hearsay evidence from a witness at trial). *Cf. Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1558 (10th Cir. 1987)(complaint of error held to be moot where complainant declined to accept the trial court's invitation to do what was complained about on appeal).

In the case at bar, the Tenth Circuit failed to consider the facts surrounding the admission of the evidence that Mr. Green was receiving disability benefits. The Tenth Circuit failed to consider the facts of this case in determining whether there was a clear abuse of discretion in order to find error. It also failed to consider the facts in determining whether what it concluded to be error prejudicially affected a substantial right of Mr. Green. The Tenth Circuit's opinion is an unprecedented departure from the law and establishes a new rule of *per se* inadmissibility and prejudicial error when such evidence is admitted in FELA cases.

There are compelling reasons why no error and no prejudice can be found under the facts of this case, even if the evidence of disability benefits were held by this Court to be

inadmissible in mitigation of damages.

First, the fact that a plaintiff is receiving disability benefits is not prejudicial unless the defendant unduly emphasizes that fact. *See, e.g., Tipton* and *Phillips* discussed, *supra,* at pp. 21-22. It is well known that railroad employees work in an industry that has a long history of unionization. The average juror comes to the courthouse with the preconceived, and correct, notion that railroad jobs are good jobs with many fringe benefits. Few jurors would be surprised to learn that a railroad worker with twenty or more years of service receives benefits if he or she becomes disabled.[10] Jurors also are familiar with Social Security. Unless they are told about the RRA, they will assume railroad workers are covered by Social Security. It hardly can be prejudicial for jurors to learn a plaintiff is receiving RRA disability benefits instead of assumed Social Security disability benefits.

Second, D&RGW was entitled to have evidence that Mr. Green was receiving RRA benefits presented to the jury because Mr. Green presented evidence that his damages included reduced RRA *retirement* benefits. Mr. Green's economist opined that Mr. Green's retirement benefits would be less because those benefits are based upon years of service and wage rates. According to Mr. Green's economist, Mr. Green would have received wage increases which would have increased the amount of his RRA pension. This evidence opened the door for a complete explanation of Mr. Green's RRA benefits. D&RGW should have been allowed to rebut the loss of retirement benefit

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[10] If a railroad worker is disabled from all employment, he or she must have at least ten years of service to qualify for RRA disability benefits. If he or she is not totally disabled but no longer is able to perform his or her railroad job, he or she must have at least twenty years of service or be at least 60 years old to qualify for these benefits. 45 U.S.C. § 231a.

evidence with evidence that Mr. Green currently was receiving RRA benefits he would not have received but for his injury. This Court has stated that "the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). *See also United States v. Flower*, 29 F.3d 530, 536 n.9 (10th Cir. 1994), *citing*, *Scivally v. Time Ins. Co.*, 724 F.2d 101, 103 (10th Cir. 1983).

Third, even if there were error, upon the facts of this case, the error was harmless. The no negligence verdict cannot be said to have been improperly influenced because the evidence of Mr. Green's receipt of RRA disability benefits was not introduced, emphasized nor pressed upon the jury by the D&RGW. The trial court invited Mr. Green to present his damage case with the deduction for the disability payments already taken into account. D&RGW did not object. However, Mr. Green had his economist do the deduction in front of the jury after explaining Mr. Green's loss of RRA retirement benefits. There is no reasonable basis to conclude that, in this case, the jury misused evidence of the disability benefits in its finding that D&RGW was not negligent.

The Tenth Circuit never considered these grounds for determining whether there was error and if so whether it was harmless. The Tenth Circuit never considered whether there were other valid reasons that would support the district court's ruling or whether reversible error could be caused by the party complaining of the error. Neither did the Tenth Circuit consider how Mr. Green was prejudiced. Such a vast departure from the law has grave consequences for all cases in which the admission of evidence is reviewed on appeal.

This Court should accept this appeal, if for no other reason, to require the Tenth Circuit to review the facts surrounding the purported error in the admission of evidence of the disability benefits in order to determine (if in fact there was error) whether the error was prejudicial or harmless. This Court's ruling on this point is necessary to stop an inconsistent advancement of a *per se* standard of prejudicial error regardless of the facts, which would be inconsistent with this Court's holding in *Tipton*. This appeal also should be granted for this Court to maintain consistency in the decisions of circuit courts and trial courts with respect to appellate review and discretion allowed trial judges to determine the admissibility of evidence.

CONCLUSION

D&RGW is concerned that this Court may be reluctant to grant this petition because D&RGW prevailed at the trial of this case. A review of the trial record clearly demonstrates that the admission of the disability benefits evidence was innocuous and did not influence the jury's finding of no negligence. If this case is retried, it is likely that the D&RGW will again prevail. This possibility would moot the important issues raised by this petition. The issues raised by this petition are now ripe for this Court's consideration. These issues are important to the entire railroad industry and need this Court's attention.

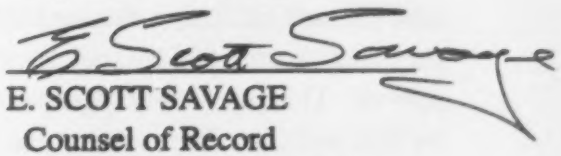
For over 30 years, railroads' rights to offsets have been influenced by the strong, but unreasoned, *dicta* in *Eichel*. For this time period, railroads have been required to pay twice for lost wages without any court explaining why this should be the law with respect to railroads but not other defendants. Railroads should not be required to continue to wait for this Court to fully consider whether its *dicta*, and the circuit courts' allegiance to

this *dicta*, is correct. By accepting this appeal, this Court now can give this issue the full consideration which it deserves.

In addition, because of the *Eichel* Court's reference to its decision in *Tipton*, the Tenth Circuit has held in this case that the allowance of such an offset creates reversible error as a matter of law and without any analysis of the facts as otherwise is done by appellate courts in reviewing a trial court's discretionary admittance of evidence. The Tenth Circuit's opinion is inconsistent with *Tipton* and Rule 403 of the Federal Rules of Evidence. Review should be granted now by this Court so that the Tenth Circuit's opinion will not remain good law if the issues of this petition are mooted by a retrial of this case.

For all the reasons stated above, D&RGW requests that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED JULY 3, 1995

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KARL GREEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 93-4073
	)	
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,	)	
	)	
	)	
Defendant - Appellee.	)	

Appeal from the United States District Court
for the District of Utah
(D.C. No. 91-C-476-A)

Norman R. Mueller of Haddon, Morgan & Foreman, Denver, Colorado (John Rossi of Morrisard, Rossi, Cox, Kiker & Inderwish, Aurora, Colorado, with him on the briefs) for

Appendix A

Plaintiff-Appellant.

E. Scott Savage (Casey K. McGarvey, also of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, with him on the brief) for Defendant-Appellee.

Before SEYMOUR, Chief Judge, LOGAN and EBEL, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff Karl W. Green brought this action against defendant, The Denver & Rio Grande Western Railroad Co. (the Railroad), under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. Plaintiff alleged that because of the Railroad's negligence, he suffered a permanently disabling injury. Plaintiff appeals from the unfavorable jury verdict, asserting that the district court erred in: (1) ruling railroad disability payments were not a collateral source and therefore were admissible into evidence; (2) refusing to instruct the jury that violation of safety rules may be considered "as negligence"; and (3) refusing to allow one of plaintiff's experts to testify. Because our disposition requires a new trial, and we believe the third issue is unique to the first trial, we discuss only the first two issues.

Appendix A

I

On the morning he was injured, plaintiff was working as a train engineer with a Railroad crew building a train. Plaintiff testified that he was sitting in the switch engine at the end of the train when it moved unexpectedly[1], throwing him from his pedestal seat and hitting his head and back on the rear of the cab. As he tried to get up to check the controls and the brakes, the train moved again and he hit his head and back a second time. Plaintiff asserted that the movements of the engine were caused by "slack action,"[2] although eyewitnesses[3] testified that they never observed or heard any significant slack action. The jury found no negligence and returned a verdict for the Railroad.

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[1] Although plaintiff testified that he was not aware that the front engine was preparing to move the train, other crew members testified that several radio transmissions had announced the move. These witnesses also testified that throughout the shift plaintiff had responded appropriately to other radio communications, and that they were not aware of any problem with radio communications.

[2] Slack action is a function of the way the coupling mechanisms hook railroad cars together. Each coupler has a drawbar which moves forward and backward in the sleeve in which it is housed. This "play" allows railroad cars to round curves without derailing. When cars are connected, they can be stretched out or bunched together by the movements of an engine. If an engine begins to pull a bunched train, each car will jerk forward as the slack is taken out in every drawbar; this can produce a violent movement at the end of the train.

[3] These eyewitnesses included Arden Brimhall, William Kranwinkle and James Thomas, members of plaintiff's crew, and James Cordner, engineer of the front engine, and Duane Wanless, assistant train master directing train movement from the tower.

Appendix A

II

A

Plaintiff asserts that the district court erred in ruling plaintiff's Railroad Retirement Act (RRA) disability benefits are not a collateral source, and thus were admissible as evidence of an allowable offset to any damages that might be awarded. The Railroad argues that plaintiff failed to preserve this issue for appeal.

After determining the RRA payments were admissible, the district court instructed plaintiff's attorney.

> [Y]ou can either present your economic damages claim and only include the amount that is over and above the disability payments he is receiving . . . and then the jury never hears about it; or if you choose to put it on, then the defendants are entitled to point out that his economic loss in the future is not as high as represented by you and your experts because he is already receiving a percentage of what he would have earned had he not been injured.

V R. 157. Plaintiff's attorney responded that "I want it understood that whether we go either way that the Court has allowed me an alternative, by doing that that I am not agreeing that that is the correct method. I still feel strongly that the Court is in error and that that is collateral source and should not come

in." *Id.* at 158. The district court responded:

> It will be clear that you're not waiving anything by electing to go any way you go . . . but it would be preferable to not bring it up at all because we would eliminate any Rule 403 problems of confusion and unfair prejudice and so on. But I'll leave it up to you. . . . I think it either comes in or it does not.

Id. at 159.

After presenting expert testimony of total damages, plaintiff's attorney resumed the exchange with the district court.

> As far as the annuity, I am going to offer this testimony, and it will be covered over the course of the testimony as $1,470.18 a month as a railroad annuity. And I want the record to reflect that the plaintiff is not waiving his right here. We feel that we have preserved that through the objection and we stated that yesterday, but we would make an objection now that it is inadmissible and should not be brought in, and understanding the Court's ruling and our options, and that is one of the options you have made available for us to make and I choose to go that way.
>
> THE COURT: All right. I think the

> record was clear before. But it is so noted.

VI R. 464. Plaintiff's economist then testified about the RRA disability annuity pension. Although plaintiff introduced evidence of the RRA disability benefits that he initially sought to exclude as a collateral source, the record supports the conclusion that plaintiff preserved this issue for appeal.

The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss. The rationale for the rule is at least two-fold: First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source. *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994). Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1171 (10th Cir. 1986). The collateral source rule generally does not apply "when the collateral source is somehow identified with the tortfeasor . . . in a suit against the tortfeasor." *Id.* at 1171. Under those circumstances the additional compensation will be used to offset tortfeasor liability because "it is as if the tortfeasor himself paid." *Id.* at 1172.

Our cases have always treated payments from the public treasury, at least when funded by a tax scheme to which the injured party contributed, as from a collateral source. *See Steckler v. United States*, 549 F.2d 1372, 1379 (10th Cir. 1977)

(social security disability payments); *EEOC v. Sandia Corp.*, 639 F.2d 600, 625, 626 (10th Cir. 1980) (state unemployment compensation); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1431-32 (10th Cir. 1985) (social security payments). *Sandia* and *Wyoming Retirement System*, both Age Discrimination in Employment Act cases, treated the use of such payments to reduce back pay judgments against defendants as a matter for the trial court's discretion. *Sandia* upheld the district court's refusal to offset state unemployment compensation payments plaintiff received. While acknowledging that making a setoff discretionary with the district court was a "somewhat questionable" approach, 639 F.2d at 625-26, the *Sandia* panel thought that approach was required by *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). *Wyoming Retirement System* upheld the discretionary reduction of a back pay awarded by the amount of social security benefits plaintiff received by drawing a distinction between purely private litigation and one where "the state was a party and tax funds were at stake." 771 F.2d at 1431-32.

Berg v. United States, 806 F.2d 978 (10th Cir. 1986), a Federal Tort Claims Act case, dealt with the issue whether medicare benefits paid by the government should be deducted from a judgment when the litigation is with the government. To avoid the setoff, *Berg* ruled that the plaintiff needed to show "only that he or she contributed to a special fund that is separate and distinct from general governmental revenues." *Id.* at 985. *Berg* concluded that medicare benefits derived in part from social security taxes paid by the plaintiff were collateral and not to be used to reduce the judgment against the United States.[4]

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[4] In *Berg*, in determining medicare benefits are collateral when a

Thus, *Berg* did not view the determination whether to allow setoff as discretionary.

If there is confusion in our cases it is unimportant, because we believe Supreme Court precedent controls this issue. As plaintiff asserts, *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), compels the conclusion that the collateral source rule prohibits admission of RRA disability benefits in a FELA case. The narrow issue in *Eichel* was whether evidence of RRA disability payments was admissible to show malingering by the plaintiff. The Supreme Court stated that "the likelihood of misuse by the jury clearly outweighs the value of this evidence" and noted that it had "recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury." *Id.* at 255 (citing *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963)). More to the point of the case before us, the Supreme Court stated that because the RRA is essentially social security for common carrier employees, benefits were not directly attributable to contributions by the defendant railroad, and thus could not be considered in mitigation of damages caused by the railroad. *Id.* at 254 (quoting *New York, N.H. & H. R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953)).

The Railroad characterizes as dicta the *Eichel* Court's statement that "it would be highly improper for the [RRA]

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plaintiff contributed to the fund, we narrowed our earlier holding in *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977), that social security disability payments were a collateral source and not deductible from damages otherwise payable to the plaintiff, except to the extent that those payments could be attributed to the government defendant. In *Berg*, we recognized "that it is in fact impossible to distinguish accurately which part of a fund that has been produced by millions of contributions is attributable to the government and which part is attributable to a particular injured party." 806 F.2d at 985.

disability pension payments to be considered in mitigation of the damages suffered." 375 U.S. at 254. However, that statement was necessary to the holding that admission of evidence of those payments to prove malingering was not harmless. We hold, therefore, that plaintiff's RRA disability annuity pension was a collateral source and not admissible to offset any damages award he might have received.[5]

C

Defendant alternatively argues that even if the RRA disability payments were a collateral source, admitting evidence of those payments was harmless becouse the jury found no liability. Several circuits have addressed this issue and determined that admission of collateral source payments was not harmless. *See Phillips v. Western Co. of N. America*, 953 F.2d 923, 925 (5th Cir. 1992) (if benefits were collateral source "and subject to exclusion, their inclusion as part of the defendant's case—and the lack of a limiting instruction—raises the possibility that the jury improperly factored the evidence into its determination of [no] liability"); *Reed v. Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 134 (3d Cir. 1991) (introduction of disability payments to a railroad employee was reversible error even when no damages were awarded because the "'likelihood of misuse by the jury clearly outweigh[ed] the

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[5] *See also Vanskike v. ACF Indus., Inc.*, 665 F. 2d 188, 200 (8th Cir. 1981) (applying *Eichel* rule that in FELA actions, "collateral source payments are inadmissible as bearing on the extent or duration of disability," and upholding district court's ruling that evidence of social security and pension disability payments were inadmissible as was fact plaintiff would not accept employment that paid less than those benefits), *cert. denied*, 455 U.S. 1000 (1982).

value of this [collateral source] evidence.'") (quoting *Eichel*, 375 U.S. at 255), *cert. denied*, 113 S. Ct. 1584 (1993); *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059, 1060-61 (6th Cir. 1984) (in FELA case, it was reversible error for judge to inform jury, in response to questions, that plaintiff received medical expense payments: "Both *Tipton* [*v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963)] and *Eichel* reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime seamen's cases." (quoting *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 822 (5th Cir. 1965)); *Sheehy v. Southern Pac. Trans.*, 631 F.2d 649, 651-53 (9th Cir. 1980) (holding, in FELA action, that Fed. R. Evid. 403 did not authorize departure from *Eichel*; therefore it was error for district court to allow evidence of collateral benefits to show malingering, and limiting instruction that informed jury it could not reduce award by amount of collateral benefits did not cure possible error, citing *Tipton*).

The major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation. As the Fifth Circuit stated in *Phillips*, "[t]he jury may feel that awarding damages would overcompensate the plaintiff for his injury . . . and may factor this into the liability calculus. This concern compels us to reject [the] suggestion that, even if introduction of post-accident benefits was error, it had no effect on the jury's finding of no negligence and therefore constituted a form of harmless error." 953 F.2d at 930.

Further, the district court here gave no instruction to the jury limiting the use of the disability payments to determinations on damages, and/or cautioning them not to consider disability

payments in their deliberations on negligence. Although defendant's counsel did not argue to the jury that the disability benefits might result in a double recovery for plaintiff, *cf. Phillips*, 953 F.2d at 930, we believe that the admission of such evidence, particularly without any limiting instruction, was reversible error.

III

Plaintiff asserts the district court erred in refusing to instruct the jury that violation of safety rules may be negligence. Because the problem could arise again in the same form at retrial we will rule on the issue. We review the district court's refusal to give a jury instruction for an abuse of discretion. *See Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1011 (10th Cir. 1992). Instructions must be considered as a whole; we will not reverse unless any errors are prejudicial. *See United Pac. Ins. Co.*, 20 F.3d at 1077.

In *Parra v. Atchison, T. & S. F. Ry.*, 787 F.2d 507, 509 (10th Cir. 1986), we stated that an alleged violation of a specific, objective safety rule could warrant an instruction on negligence per se. However, in *Parra* we upheld the district court's refusal to give the tendered instruction because the safety rule at issue was not specific enough to supply a standard the jury could apply.

The instruction tendered by plaintiff in the instant case stated: "If any employees of the Defendant, The Denver & Rio Grande Western Railroad, violate *any* rules or regulations of the Defendant, you may consider this as negligence against the Defendant." Appellant's App. 82 (emphasis added). The

broad language of this instruction fails to limit the jury to consideration of specific, objective safety rules.[6] The proposed instruction would allow a finding of negligence without requiring the jury to find the rule violation contributed to the injury. Further, the instructions actually given, as a whole, properly defined negligence. Therefore, we cannot conclude that the court's failure to give instruction 40, tendered by plaintiff, prejudiced him or that the district court abused its discretion in refusing to give the proffered instruction.

REVERSED and REMANDED for further proceedings in accordance with this opinion.

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[6] On appeal plaintiff asserts that defendant violated its Rules 61-B, 801, and 0.

APPENDIX B - JUDGMENT IN A CIVIL CASE DATED DECEMBER 10, 1992

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

KARL W. GREEN,

JUDGMENT IN A CIVIL CASE

v.

THE DENVER &
RIO GRANDE
WESTERN RAILROAD
COMPANY, a corporation.

CASE NUMBER: 2:91-cv-0476B

☒ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. SPECIAL JURY VERDICT

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT BE AND IT IS HEREBY ENTERED IN FAVOR OF DEFENDANT THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND AGAINST THE PLAINTIFF "NO CAUSE OF ACTION".

December 10, 1992
Date

s/ M. B. Zimmer
Clerk M. B. Zimmer

Appendix B

LA RENE CHRISTENSEN
(By) Deputy Clerk

APPENDIX C - SPECIAL VERDICT FORM DATED DECEMBER 8, 1992 AND FILED DECEMBER 9, 1992

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

KARL GREEN,

Plaintiff,

vs.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware corporation.

Defendants.

VERDICT

Case No. 91-C-476B

We, the jury, answer the questions submitted to us in the special verdict as follows:

QUESTION NO. 1. Was there negligence on the part of the defendant, Denver & Rio Grande Western Railroad Company, which was a cause of the accident?

Answer: Yes ___ No X

If you answered the above question "Yes," then please answer Question No. 2. If you answered the above question "No," you will not answer the remaining questions, but will simply sign the verdict.

QUESTION NO. 2. Was there negligence on the part of

the plaintiff, Karl Green, which was a cause of the accident?

Answer: Yes ___ No___

If you answered "No" to Question No. 2, then you will not answer Question No. 3, but will next answer Question No. 4.

If you answered "Yes" to both prior questions, then answer Question No. 3.

QUESTION NO. 3. We find that the parties contributed to the cause of the accident in the following percentages:

(a) The Plaintiff Karl Green _____%
(b) The Defendant Denver & Rio Grande Western Railroad Company _____%

Total 100%

Regardless of the percentages of negligence you will answer Question No. 4.

QUESTION NO. 4: What is the total amount of damages sustained by the plaintiff, Karl Green, that will fairly compensate him for his injuries?

$_____

DATED this 8th day of December, 1992.

s/ Beverly J. Dening
FOREPERSON

APPENDIX D - FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect of insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

APPENDIX E - TRANSCRIPT OF THE DISTRICT COURT'S RULING AT TRIAL

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

KARL W. GREEN, Plaintiff,	)	
vs.	)	Civil No. 91-C-467B
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation. Defendant.	)	

BEFORE THE HONORABLE DEE BENSON

December 2, 1992

Trial Day Two

(p. 156) THE COURT: . . . With respect to the collateral source issue, on the disability payments under the Railroad Retirement Act, I am going to allow evidence of that collateral source income. It makes absolutely no sense to the Court at all to not allow an offset for income that is being received pursuant to the Railroad Retirement Act where disability or regular pension benefits were the reason for the act in the first place.

Appendix E

Now, I am perfectly willing to be bound by decisions (p. 157) of the Supreme Court but I have read very closely the Icko [Eichel] case and read it again last night in calmer moments. That issue was not raised, Mr. Savage, Mr. Hoffman is quite right, it is dictum that suggests that perhaps the issue of whether there can be an economic offset for payments received under the Railroad Retirement Act are not deductible, but it is not clear, and when I read the EEOC case from the Tenth Circuit one thing does appear clear to me and that is that it is in my discretion to allow an offset or not under the collateral source doctrine. And in this type of case where the same employer would be involved at least to a significant extent in paying twice, I'll give you your choice, Mr. Rossi and Mr. Thurber, you can either present your economic damages claim and only include the amount that is over and above the disability payments he is receiving, which I believe is half of his gross pay —

MR. ROSSI: No, I think it is $1,300 a month.

THE COURT: Whatever it is, and I don't need to get into the amount, but you can either choose to do it that way and then the jury never hears about it; or if you choose to put it on, then the defendants are entitled to point out that his economic loss in the future is not as high as represented by you and your experts because he is already receiving a percentage of what he would have earned had he not been injured. I understand the policies behind the collateral (p. 158) source rule. There isn't, as I understand it, a subrogation right by the railroad, is there, Mr. Savage?

MR. SAVAGE: No, Your Honor.

Appendix E

THE COURT: We don't have a typical insurance policy situation here. It would strike me as being extremely unfair to require this employer to pay twice for the same injury in effect under the circumstances. So that is the Court's ruling on that.

MR. ROSSI: Your Honor, not by way of admission that the Court's ruling is correct, certainly I respect the Court's ruling, but may we have —

THE COURT: I don't expect that you accept it as correct, but it is the ruling of the Court.

MR. ROSSI: I understand that and we'll abide by that. But what I would like to do is — I don't think we're going to get into that at all this morning and we need to talk to our economist to see if he can change the figures in time to do that, and I would want until maybe even this afternoon to inform you and Mr. Savage which way we want to go. But I want it understood that whether we go either way that the Court has allowed me an alternative, by doing that that I am not agreeing that that is the correct method. I still feel strongly that the Court is in error and that that is collateral source and should not come in. But I understand the Court's ruling and we'll just have to take whatever option we feel we should.

(p. 159) THE COURT: It will be clear that you're not waiving anything by electing to go any way you go. You don't need to tell me what you're going to do until you do it. Probably as a matter of courtesy you ought to inform the defendants so they know how to prepare, but it would be preferable to not bring it up at all because we would eliminate any Rule 403 problems of confusion and unfair prejudice and so on. But I'll

leave it up to you. I am not going do what Judge Greene did. I think it either comes in or it does not. It comes in to the fact finder or it does not. And I scoured the collateral source rule — scoured is a little strong — I looked hard at it, considered it and I just don't think that the Tenth Circuit or the Supreme Court, if it gets to them, will have a contrary point of view. And at bottom it appears in the trial judge's discretion at any rate as it was in the EEOC case.

APPENDIX F - EICHEL V. NEW YORK CENTRAL RAILROAD CO.

375 U.S. 253

EICHEL

v.

NEW YORK CENTRAL RAILROAD CO.

No. 480

Dec. 16, 1963

PER CURIAM.

Petitioner, who had been employed by respondent New York Central Railroad for 40 years, brought this action against respondent under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., in the District Court for the Southern District of New York. The complaint alleged that in 1960, as a result of respondent's negligence, petitioner suffered a permanently disabling injury. The jury returned a verdict of $51,000 for petitioner and the District Court entered judgment in accordance with that verdict. Respondent offered evidence that petitioner was receiving $190 a month in disability pension payments under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. § 228b(a) 4.

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This evidence was offered for the purpose of impeaching the testimony of petitioner as to his motive for not returning to

work and as to the permanency of his injuries. The trial court excluded the evidence in response to the objection of petitioner's counsel. The Court of Appeals for the Second Circuit reversed, holding it prejudicial error to exclude the evidence of the disability pension, and remanded "for a new trial, limited, however, to the issues of injury and resulting damages * * *." 2 Cir., 319 F.2d 12, 14. The court affirmed the judgment as to the determination of negligence." Ibid. We grant certiorari and reverse the judgment of the Court of Appeals.

Respondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner. Thus it has been recognized that:

> "The Railroad Retirement Act is substantially a Social Security Act for employees of comment carriers. * * * The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." New York, N. H. & H. R. Co. v. Leary, 1 Cir., 204 F.2d 461, 468, cert. denied, 346 U.S. 856, 74 S.Ct. 71, 98 L.Ed. 370.[1]

Respondent argues that the evidence of the disability payments,

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[1] See Sinovich v. Erie R. Co., 3 Cir., 230 F.2d 658, 661; Page v. St. Louis S. Ry. Co., 5 Cir., 312 F.2d 84, 94. See also Gregory and Kalven, Cases and Materials on Torts (1959), pp. 480-482; McCormick, Damages (1935), P. 310, n. 2; Comment, 38 Mich.L.Rev. 1073.

although concededly inadmissible to offset or mitigate damages, is admissible as bearing on the extent and duration of the disability suffered by petitioner. At the trial counsel for respondent argued that the pension would show "a motive for [petitioner's] not continuing

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work, and for his deciding not to continue going back to work after the last accident." On the basis of this argument the Court of Appeals concluded that the disputed evidence should have been admitted because: "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will * * * create substantial danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." 319 F.2d, at 20.

We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence.[2] Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statues if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. § 228b(a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. Tipton v. Socony Mobil Oil Co., Inc., 375 U.S. 34,

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[2] Cf. McCormick, Evidence (1954), c. 19; 2 Wigmore, Evidence (1940), § 282a.

84 S.Ct. 1.[3] It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse.[4] Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments.

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Accordingly, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice HARLAN, concurring in part and dissenting in part.

Once again, I am obliged to record my view that certiorari should not have been granted in a case of this kind, involving only a question of the admissibility of evidence in a suit under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51. See my dissenting opinion in Tipton v. Socony Mobil Oil Co., Inc., earlier this term, 84 S.Ct., p. 3.

On the merits, I agree with the majority that the judgment

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[3] See Kalven, the Jury, the Law and the Personal Injury Damage Award, 19 Ohio St.L.J. 158, 169.

[4] See notes 1-3, supra.

below should be reversed, but for different reasons. Whether or not evidence that the petitioner was receiving disability pension payments under the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U.S.C. § 228a, should have been admitted depends on a balance between its probative bearing on the issue as to which it was offered, in this case the respondent's claim that petitioner was a malingerer, and the possibility of prejudice to the petitioner resulting from the jury's consideration of the evidence on issues as to which it is irrelevant. When a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial judge, subject to review for abuse. See Uniform rules of Evidence, Rule 45; Model Code of Evidence, Rule 303. It is he who is in the best position to weight the relevant factors, such as the value of the disputed evidence as compared with other proof adducible to the same end and the effectiveness of limited instructions. Believing that

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this rule should have been followed here, I concur in reversing the judgment below, which not only held the evidence not inadmissible as a matter of law but also directed its admission on retrial.

For the same reasons, however, I dissent from the majority's holding that the evidence is required to be excluded. I see no reason why evidentiary questions should be given different treatment when they arise in an F.E.L.A. case than when they arise in other contexts.

APPENDIX G - TIPTON V. SOCONY MOBIL OIL COMPANY, INC.

375 U.S. 34

TIPTON

v.

SOCONY MOBIL OIL COMPANY, INC.

No. 200

Oct. 1963
Rehearing Denied Dec. 2, 1963

PER CURIAM.

Petitioner brought this action in the District Court for the Southern District of Texas against his employer under the Jones Act. 46 U.S.C. § 688. The principal issue was whether, in view of the nature of the work performed at the time of injury, the petitioner was a seaman, hence within the coverage of the Jones Act, or an offshore drilling employee. At the trial before a jury, the District Court admitted evidence, over the objection of petitioner's counsel, that petitioner had accepted compensation benefits

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under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., as applied through the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. The latter Act, although extending longshoremen's

compensation to a new group, is explicitly inapplicable to a "member of a crew of any vessel." 43 U.S.C. § 1333(c)(1). In response to a special interrogatory the jury found that the petitioner was not a seaman or member of a crew of a vessel within the meaning of the Jones Act. Judgment was then entered upon the verdict for the respondent. The Court of Appeals for the Fifth Circuit unanimously held it error to have admitted the evidence of other compensation benefits but, with one judge dissenting, found the error harmless.[1] We grant the petition for a writ of certiorari and vacate the judgment.

We do not agree that on the record in this case the error may be regarding as harmless.[2] There can be no doubt that the evidence of other benefits was pressed upon the jury. Throughout the trial respondent's counsel emphasized that the petitioner "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act * * * ." The only argued relevance of this evidence was that it indicated what the petitioner had thought to be his legal status. The judge did not, however, frame a cautionary instruction or otherwise charge the jury that the evidence of other compensation might be considered only insofar as it revealed what the petitioner and others thought his status to be—whether seaman or drilling

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[1] 315 F.2d 660, 662 (Brown, J., dissenting).

[2] The majority of the Court of Appeals explained its conclusion as follows: "[I]n view of the fact that the jury, having decided the question of status adversely to appellant, never reached the issue of damages, we believe that the error did not prejudice appellant and was harmless." 315 F.2d 660, at 662.

employee—and was not dispositive of the ultimate fact of whether he was a seaman. To the contrary, the judge's charge, containing an elaborate discussion of the Longshoremen's and Harbor Workers' Compensation Act and a restatement of the disputed evidence, only heightened the likelihood of prejudice.

A subsequent exchange between judge and jury did not, in our opinion, negate the cumulative impact of the evidence and the instructions. The jury, while deliberating, sent the following note to the judge:

> "If we find Mr. Tipton is not a seaman or a member of the crew of drilling barge No. 1, does he have recourse for compensation under the Outer Continental Shelf or other act?"

The judge immediately replied:

> "This is not a matter for the jury's consideration. You should consider only the questions submitted and the evidence thereon."

The petitioner contends, correctly we think, that this reply was insufficient to overcome the impact of the evidence of other compensation as submitted to the jury.[3] Although the judge's reply excluded from the jury's consideration the availability of

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[3] Not until after the verdict and after the discharge of the jury did counsel learn of the jury's inquiry and the judge's reply. Petitioner's counsel, when informed, immediately took exception to the procedure and the reply. However, for present purposes we need not question the permissibility of the procedures involved.

alternative benefits in a future action, it did not preclude or restrict consideration of the evidence presented concerning prior receipt of compensation payments. The direction to consider "the questions submitted" was not illuminating and the further reference to "the evidence thereon" necessarily encompassed the admitted evidence of payments received and retained by petitioner.

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We disagree with the suggestion of the Court of Appeals that the prejudicial effect of the evidence of other compensation would be restricted to the issue of damages and would not affect the determination of liability.[4] That suggestion ignores that the evidence was presumably considered without qualification as bearing on a basic fact essential to liability. Indeed, the jury's inquiry to the judge seems to indicate that, under the case as submitted, the jury was led to place undue emphasis on the availability of compensation benefits in determining the ultimate question of whether the petitioner was a seaman within the Jones Act. On such a record the disputed evidence cannot properly be deemed harmless. 28 U.S.C. § 2111; Fed. Rules of Civ. Proc. 61. Cf. Kotteakos v. United States, 328 U.S. 750, 66 S.C. 1239, 90 L.Ed. 1557.

The judgment of the Court of Appeals for the Fifth Circuit is vacated and the case remanded to the District Court for the Southern District of Texas for proceedings in accordance with this opinion.

It is so ordered.

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[4] See note 2, supra.

Appendix G

Judgment of Court of Appeals vacated and case remanded.

Mr. Justice HARLAN, dissenting.

I am of the opinion that the petition for certiorari should have been denied in this case, which raises only a question of the admissibility of certain evidence and a ruling of the Court of Appeals that the admission of the evidence, which it thought erroneous, was harmless. See my opinion in Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 559, 77 S.Ct. 457, 478, 1 L.Ed.2d 511, and the dissenting opinion of Mr. Justice Frankfurter in the same case, id., 352 U.S. at 524, 77 S.Ct. at 458, 1 L.Ed.2d 511.

Since the petition has been granted, I am constrained to say that I am doubtful of the ruling before that evidence probative of the petitioner's belief as to his status as a seaman or drilling employee was irrelevant to the issue of what his status actually was. His belief to be

sure did not amount to a demonstration of the fact; but it seems to me sufficiently relevant to be not clearly inadmissible on the issue of his status, to show which was the purpose for which the evidence was offered. In any event, I find no solid reason for disturbing the view of the Court of Appeals that the admission of this evidence in the circumstances of this case did not prejudice the petitioner and was, therefore, harmless error.

Accordingly, while I believe the case is not "certworthy," I would affirm the judgment below.

Supreme Court, U.S.
FILED
OCT 27 1995

No. 95-530

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

v.

KARL W. GREEN,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-530

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

v.

KARL W. GREEN,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues and employ 91 per cent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in the United States, Congress structured this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.[1]

Each year thousands of claims and lawsuits are asserted under FELA against AAR members. In recent years, FELA costs have risen to over $1 billion a year, far more than is spent by private industry in general in payment of compensation to injured employees.[2]

This case has a direct and substantial impact on the amounts paid by railroads to compensate their injured employees. The ruling confirms a practice of double payment imposed on railroads; they must fully compensate an injured employee for lost wages and also serve as primary contributors to disability benefits from the Railroad Retirement System which compensates for the same loss.[3]

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[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] For the past four years, the major railroads have spent between $1.2 and 1.3 billion on FELA annually, or nearly 4 per cent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT"). Private industry other than railroads pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), whereas railroads pay over $2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

[3] The Railroad Retirement System, another system unique to the railroad industry, provides retirement and other benefits to employees. 45 U.S.C. §§ 231-231u. The funding of Railroad Retirement

As a result, individual employees can reap a double recovery from the same source. AAR has a strong interest in seeking amelioration of this unwarranted and unfair financial burden on its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE LOWER COURT'S RULING WHICH PERMITS EMPLOYEES TO RECEIVE EMPLOYER-FUNDED DOUBLE BENEFITS FOR THE SAME LOSS

The ruling below decides a significant legal issue in FELA cases: the application of the collateral source rule to Railroad Retirement disability annuities, on the basis of dicta in a decision of this Court, *Eichel v. New York Central R. Co.*, 375 U.S. 253 (1963). Even though the issue has never been squarely presented to this Court, the court below, and other lower courts, have eschewed analysis and simply established and sustained a rule that visits an unfair and costly burden on the railroad industry.

A. The Railroad Retirement System Provides Substantial Benefits to Disabled Employees on Top of the Compensation Provided by FELA

Railroads and their workers are afforded unique treatment in many areas of industrial relations. They are governed by a federal tort law—the Federal Employers' Liability Act (FELA)—rather than the no-fault workers' compensation laws that cover the vast majority of other industries. Workers' compensation schemes cap employers' liability, but FELA does not.[4] While FELA is nomi-

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benefits comes primarily from a payroll tax levied on the rail industry. *See infra* note 15 and accompanying text.

[4] All workers' compensation laws cap weekly benefits available to employees. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORK-

nally a negligence statute, its standard of causation has been reduced through judicial interpretation; as a result, the burden on plaintiffs to prove the elements of their claims is lower and the likelihood of recovery is higher.[5] Moreover, if a safety statute violation is the cause of an injury, the employee need not show negligence in order to recover.[6]

Unique treatment for the railroad industry also marks its retirement system. Railroads are not covered by the Social Security System, which extends to virtually all Americans. Instead, railroads workers are covered by the Railroad Retirement System. This system provides benefits to railroad retirees that are similar to Social Security benefits, as well as additional benefits that are above and beyond what Social Security beneficiaries receive.[7] Among the benefits provided under the Railroad Retirement System are disability annuities, available to employees who qualify on the basis of age and/or years of service.[8]

ERS' COMPENSATION LAWS 22-25, Chart VI (1994). Some impose additional limitations on benefits. Only punitive damages are excluded from FELA awards. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971); *Wildman v. Burlington Northern R. Co.*, 825 F.2d 1392, 1393-95 (9th Cir. 1987).

[5] *See, Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957); *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Marchica v. Long Island R. Co.*, 31 F.3d 1197, 1207 (2nd Cir. 1994).

[6] If a safety statute is violated, it is considered negligence *per se*. *Urie* v. *Thompson*, 337 U.S. 163, 189 (1949); *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949).

[7] The two aspects of Railroad Retirement benefits are known as Tier I and Tier II. While Tier I is considered to be a Social Security equivalent, there are differences. For example, rail employees with 30 years of service may retire at age 60 at a reduced benefit, or at age 62 with no reduction. Social Security beneficiaries may not retire until age 62, and then, only at a reduced benefit. U.S. Railroad Retirement Board, 1994 Annual Report 74 (1994). ["RRB Annual Report"]

[8] 45 U.S.C. § 231a.

Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[9] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability, a special benefit not available to workers covered by Social Security.[10]

Importantly, a rail employee may qualify for a disability benefit regardless of whether the disability was the result of a work-related injury, also covered by FELA, or some other cause. Thus, while FELA and the Railroad Retirement System were designed at different times to serve different purposes, they can act to provide an employee with two sources of benefits for the same loss.

A significant number of rail employees receive disability benefits. In fiscal year 1993, 4,800 disability annuities were awarded to rail workers, of which 3,300 were for occupational disability.[11] The average monthly occupational disability awarded was $1,528; the average monthly total and permanent disability annuity awarded was $971.[12] As of September 30, 1993, disability annuities were being paid to about 78,000 former railroad workers.[13] Former rail employees received nearly $1 billion in disability benefits in 1993, the majority of which,

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[9] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[10] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[11] RRB Annual Report at 21.

[12] *Id.*

[13] *Id.* at 22.

$846 million, was paid in occupational disability annuities.[14]

Occupational disability benefits, like all Railroad Retirement benefits that are over an above what are available to Social Security recipients, are financed by Tier II payroll taxes, which come primarily from railroad employers. The Tier II payroll tax is equal to 21 per cent of each employee's earnings (up to a threshold amount), of which 16.10 per cent is paid by the employer.[15] In fiscal year 1993, the employer share of Tier II taxes was about $1.695 billion; [16] in fiscal 1994, it was about $1.704 billion.[17]

B. The Decision Below Improperly Applies the Collateral Source Rule to Confer an Unwarranted Windfall on Employees and Impose a Burden on Employers

FELA plaintiffs can recover for lost compensation without a cap on recovery, a result that gives rail workers a preference over employees in other industries.[18] Often, the same individuals can also avail themselves of occupational disability annuities, another benefit unavailable to employees outside the rail industry. While the appropriateness of affording such differential treatment to one sector of the economy is a matter within the province of the Congress, it is for the courts to interpret FELA, including the applicability of legal doctrines like the collateral source rule.

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[14] *Id.*

[15] 26 U.S.C. § 3221(b). The remaining 4.9 per cent is paid by the employee. 26 U.S.C. § 3201(b).

[16] RRB Annual Report at 6.

[17] 1994 figure obtained directly from Railroad Retirement Board by AAR.

[18] Under workers' compensation, employees' wage loss benefits are capped. *See supra* note 4.

The purpose of the collateral source rule is to prevent a tortfeasor from gaining a windfall because the plaintiff is receiving compensation from an independent source.[19] The trial court recognized that this rationale did not apply in this case, where the railroad had funded the other source of compensation, stating that it would be "extremely unfair to require [the] employer to pay twice for the same injury in effect under the circumstances." (Pet. Brief at Appendix E, 20a). The Tenth Circuit itself recognized that, "[t]he collateral source rule generally does not apply 'when the collateral source is somehow identified with the tortfeasor.'" 59 F.3d 1029, 1032 (1995). Nonetheless, the Tenth Circuit reversed the trial court, holding that the collateral source rule precluded the railroad from showing that the plaintiff had received a Railroad Retirement disability annuity and that such payment should offset the FELA recovery. The unfairness of the Tenth Circuit's decision results in significant financial consequences to the nation's railroads.

The windfall is potentially in the hundreds of millions. AAR member railroads report that a substantial portion of employees who allege disabling work-related injuries and leave the industry in connection with a FELA settlement or judgment also are eligible for Railroad Retirement disability benefits.[20] As a result, substantial amounts of the money are paid under FELA to employees who are receiving an annuity partially to compensate for the same injury. Two major railroads have each paid between $45 and 70 million during each of the last five years to such

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[19] *Kassman v. American University*, 546 F.2d 1029, 1034 (D.C. Cir. 1976); *FDIC v. United Pacific Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994). 22 AM. JUR. 2d *Damages* § 566 (1988).

[20] *See* letters from AAR members Burlington Northern Railroad (Oct. 19, 1995), CSX Transportation (Oct. 11, 1995), Kansas City Southern Railway Company (Oct. 17, 1995) and Union Pacific Railroad (Oct. 18, 1995) to the Association of American Railroads, on file at the office of Amicus, 50 F Street, N.W., Washington, D.C. 20001.

employees; a third reports paying between $25 and 50 million annually during that period.[21] A number of small railroads report paying substantial amounts, as compared to the size of their operations, to such claimants; in some cases over $1 million a year.[22] While some of the FELA payout is to compensate for nonwage losses, much of it goes to compensate employees for the very wage loss covered by the disability annuities.

Review of this case will allow this Court carefully to consider the important policy issues raised, an analysis which heretofore has not been undertaken. It will allow both parties to address the question of whether the collateral source rule should be applied to deny a railroad the ability to introduce evidence that a FELA claimant is receiving, or will be eligible to receive, disability benefits that will partially compensate him or her for lost wages. To leave undisturbed the ruling below would permit rail employees to continue to receive both the full amount of disability benefits for which they qualify and to seek compensation for full wage loss under FELA, with the juries hearing their claims unaware of the double recovery. A matter which so fundamentally affects the rights of FELA litigants deserves careful review by this Court.

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[21] *See* letters from Burlington Northern Railroad, CSX Transportation and Union Pacific Railroad to the Association of American Railroads, *supra* note 20, on file at office of Amicus.

[22] *See* letters from Boston & Maine Corp., Maine Central Railroad Co. and Springfield Terminal Railway Co. (Oct. 13, 1995), also Chicago & Illinois Midland Railway Co. (Oct. 12, 1995), and Norfolk & Portsmouth Belt Line Railroad (Oct. 11, 1995) to Association of American Railroads, on file at office of Amicus.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Tenth Circuit in this case be granted.

Respectfully submitted,

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October Term, 1995

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

KARL W. GREEN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Karl W. Green ("Mr. Green"), plaintiff in the trial court, respectfully requests that the Petition For Writ Of Certiorari filed by the Denver & Rio Grande Western Railroad Company ("the Railroad") to review the judgment of the Tenth Circuit Court of Appeals be denied. The Court of Appeals correctly decided the evidentiary issue presented in conformity with precedent of this Court. Likewise, every circuit court of appeals which has addressed the issue is in agreement. The Petition For Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Mr. Green was working as an engineer for the Railroad when he was injured during the graveyard shift on June 20, 1988. That night Mr. Green was operating a switching engine at one end of a train when he struck his head after being thrown from his pedestal seat by the unexpected movement of the train. A number of mental health professionals concluded that Mr. Green had suffered a brain injury in the accident and was significantly impaired. Mr. Green sued the Railroad under the provisions of the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), arguing that the Railroad was liable for his injuries because the safest method had not been employed in moving the train and various safety and operating rules had been violated.

Arguing that no safety rules had been violated, the Railroad contended it was not negligent. The Railroad

also claimed that Mr. Green's condition was not consistent with his having suffered a major head injury in the accident and that his psychological problems were the result of preexisting depression.

Prior to trial, Mr. Green filed a motion in limine pursuant to this Court's holding in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), to preclude evidence that he was receiving disability payments under the Railroad Retirement Act. The Railroad opposed the motion, arguing that the disability benefits were not a collateral source and any damage award should be offset by the amount of benefits received by Mr. Green. Ultimately, the Railroad took the position that evidence of disability payments should be presented to the jury.

Although the district court, after reviewing *Eichel*, initially agreed that evidence of the disability payments should not be heard by the jury, it took Mr. Green's motion under advisement. The next day, the district court reversed course, ruled that the evidence of the disability payments was admissible and denied Mr. Green's motion in limine. The trial court informed Mr. Green he could deal with the ruling by either of two approaches. First, Mr. Green's economist could alter his damage calculations by deducting the disability payments and attempt to avoid mentioning the payments during his testimony. Alternatively, Mr. Green could present his evidence of damages as originally calculated, and the jury could then hear evidence of the disability payments. The district court made it clear Mr. Green could choose either alternative method of dealing with the ruling and preserve his claim of error.

After presenting expert testimony concerning damages, Mr. Green's attorney informed the court he had chosen the alternative of presenting evidence of the disability payments, again confirmed his continuing objection to the evidence and sought assurances that this course of action preserved the claim of error to the admission of this evidence. The district court reaffirmed that Mr. Green had preserved his objection to the evidence.[1] (Pet. App. pp.5a-6a)

After trial, the jury returned a verdict in favor of the Railroad. The Tenth Circuit reversed the judgment of the district court. *Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029 (10th Cir.1995). Following this Court's holdings in *Eichel* and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), the Court of Appeals concluded that "the collateral source rule prohibits admission of [Railroad Retirement Act] disability benefits in a FELA case." 59 F.3d at 1033 (Pet. App. p.8a)[2]

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[1] Despite this clear record, the Railroad argued on appeal that Mr. Green had failed to preserve his objection to the evidence of payments from a collateral source. The Tenth Circuit quickly rejected that argument. 59 F.3d at 1031-32 (Pet. App. pp.4a-6a)

[2] Since the Court of Appeals ordered a new trial, it found it unnecessary to address the argument that the district court also had erred by refusing to allow one of Mr. Green's expert witnesses to testify. 59 F.3d at 1030 (Pet. App. p.2a) If this Court grants certiorari and reverses the Court of Appeals, that issue would need to be resolved on remand.

REASONS THE PETITION SHOULD BE DENIED

1. The decision of the Tenth Circuit is controlled by *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), and the Railroad has failed to present any compelling argument that *Eichel* should be overruled.

The Railroad concedes that the decision of the Tenth Circuit Court of Appeals is in conformity with this Court's opinion in *Eichel*. (Pet. p.11) Nevertheless, the Railroad seeks certiorari on the evidentiary issue presented by this case, asking this Court to overrule what it characterizes as the "dicta"[3] in *Eichel*.

In *Eichel* the defendant railroad sought to introduce evidence of plaintiff's disability benefits under the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* ("RRA"), as bearing on the extent and duration of the disability suffered by the plaintiff. On the way to rejecting the railroad's argument, this Court noted that the railroad did "not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner." *Eichel*, 375 U.S. at 254. Leaving no room for doubt as to the basis for its decision, this Court explained "the likelihood of misuse by the jury clearly outweighs the value of this evidence . . . petitioner's receipt of collateral social insurance

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[3] The Tenth Circuit rejected the Railroad's characterization of the *Eichel* Court's holding as dicta. The court recognized that this Court's conclusion that Railroad Retirement Act benefits could not be considered in mitigation of damages caused by the railroad was necessary "to the holding that admission of evidence of those payments to prove malingering was not harmless." 59 F.3d at 1033 (Pet. App. pp.8a-9a)

benefits involves a substantial likelihood of prejudicial impact." *Id.*, 375 U.S. at 255.

The Railroad attacks the holding in *Eichel* that disability benefits under the RRA fall within the collateral source rule. The Railroad's argument appears limited to the fact that it is mandated by federal law to contribute to the RRA fund. However, a major source of revenue for that fund is the tax imposed on railroad employees. 26 U.S.C. § 3201. Other than baldly asserting at trial that RRA benefits should not be included in the collateral source rule, the Railroad presented no factual basis to support its argument. This Court obviously was aware of the funding scheme for the RRA when it reached the contrary conclusion and quoted with approval from *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953):

> The benefits received under such a system of social regulation are not directly attributable to the contribution of the employer, so they cannot be considered in mitigation of the damages caused by the employer.

Eichel, 375 U.S. at 254.

To the extent the Railroad's petition seeks to challenge the collateral source rule itself, it is not an issue preserved for review. The Railroad did not mount such a challenge in either the district court or the Tenth Circuit and is precluded from doing so at this late date. *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937, 1942 n.9 (1994) (Supreme Court will not consider issue not raised in trial court or Court of Appeals).

The decision by the Tenth Circuit is in accord with *Eichel* and the Railroad has failed to present any compelling argument that *Eichel* should be overruled.

2. The opinion of the Tenth Circuit is in conformity with other federal circuit courts which consistently have followed *Eichel*.

The Railroad also complains about the adherence the circuit courts of appeals have demonstrated to the *Eichel* ruling. The Railroad suggests that this consistent application of *Eichel* is not warranted, claiming that the Court in *Eichel* did not "fully analyze" (Pet. p.6) the issue. However, the conceded lack of a conflict in the circuits illustrates why the petition for certiorari should be denied. *See* Supreme Court Rule 10(a).

The continuing vitality of the *Eichel* rule has been recognized throughout the circuits. Evidence of collateral source payments are inadmissible in FELA cases. *Reed v. Philadelphia, Bethlehem & New England R. Co.*, 939 F.2d 128, 134 (3rd Cir.1991) (railroad's reference to disability benefits in closing argument reversible error even when in response to improper closing argument by plaintiff), *cert. denied*, 113 S.Ct. 1584 (1993); *Stillman v. Norfolk & Western Ry. Co.*, 811 F.2d 834, 838 (4th Cir.1987) (since defendants in FELA cases are not permitted to inform jury of benefits received by plaintiff from collateral source, there is no reason for different rule when plaintiff seeks to inform jury of absence of benefits); *Wilcox v. Clinchfield R. Co.*, 747 F.2d 1059, 1060 (6th Cir.1984) (recognizing that the rule of *Eichel* is "firmly established law," reversed judgment for railroad due to trial court's response to jury

question informing jury of existence of collateral source benefit); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 200 (8th Cir.1981) ("collateral source payments inadmissible *per se*"), *cert. denied*, 455 U.S. 1000 (1982); *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 651-52 (9th Cir.1980) (rejecting argument that *Eichel* rule was displaced by Fed.R.Evid. 403 and holding that limiting instruction did not cure error resulting from evidence of collateral benefits introduced to show malingering).

The prejudicial impact of evidence concerning collateral source benefits also has been recognized in cases other than FELA actions. For example, the Fifth Circuit, relying on *Eichel*, held that evidence of disability benefits is inadmissible in a Jones Act case. *Phillips v. Western Co. of North America*, 953 F.2d 923, 929 (5th Cir.1992). *See also In re Air Crash Disaster Near Chicago, May 25, 1979*, 803 F.2d 304, 309 (7th Cir.1986) (in wrongful death action, trial court did not abuse its discretion in determining prejudice of evidence of insurance benefits outweighed any probative value). Prior to this case, the Tenth Circuit also recognized the continued validity of the *Eichel* rule in *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 497 (10th Cir.1985), a case for damages for exposure to toxic gas, citing *Eichel* and stating: "clearly, reference during trial to the plaintiff's receipt of collateral benefits is not allowed."

To the extent the Railroad is arguing simply that any recovery should be offset by RRA benefits received by Mr. Green, it is not an issue presented by this case. The Railroad was not content at trial to settle for a post-verdict offset from any damage, nor did the district court so insulate the jury from its ruling. The issue in this case

resolved by the Court of Appeals is whether it is prejudicial error to present evidence of the RRA benefits to the jury. Courts consistently have found such evidence to be prejudicial and the Tenth Circuit agreed.

3. The decision of the Tenth Circuit is not at odds with other decisions of that court.

Having conceded the decision of the Tenth Circuit is in accord with *Eichel* and all circuit court cases which have addressed this evidentiary issue, the Railroad attempts to manufacture an inconsistency between this decision and other cases from the Tenth Circuit dealing with the application of the collateral source rule in other contexts. No such conflict exists.

The Railroad's argument was addressed and answered in the Court of Appeals' opinion. The court noted that "[o]ur cases have always treated payments from the public treasury, at least when funded by a tax scheme to which the injured party contributed, as from a collateral source." 59 F.3d at 1032 (Pet. App. p.6a) However, the court noted that some confusion may have been created by decisions in two cases involving claims under the Age Discrimination in Employment Act in which the court treated the use of benefit payments to reduce back pay judgments against defendants as a matter of trial court discretion. *See EEOC v. Wyoming Retirement System,* 771 F.2d 1425, 1431-32 (10th Cir.1985) (social security payments); *EEOC v. Sandia Corp,* 639 F.2d 600, 625-26 (10th Cir.1980) (state unemployment compensation benefits). In contrast, in *Berg v. United States,* 806 F.2d 978 (10th Cir.1986), the court had not viewed the issue of

setoff as a matter of trial court discretion in concluding that Medicare benefits derived in part from social security taxes paid by the plaintiff were collateral and could not be used to reduce the judgment against the United States.

As the Tenth Circuit recognized, none of those cases involved RRA benefits, which this Court has concluded are covered by the collateral source rule. Thus, any confusion created by the two age discrimination cases was unimportant to the resolution of this case. 59 F.3d at 1032.[4]

In addition, there is an important distinction between the two age discrimination cases and the instant case. *Wyoming Retirement System* and *Sandia Corp.* involved trials to the court in EEOC actions. Whether or not the trial court ultimately reduced a back pay judgment by the amount of benefits received, there was no danger of prejudicing a jury with such evidence.

The Railroad also argues, without benefit of authority, that the Tenth Circuit's "allegiance to *Eichel* deprives railroad defendants of equal protection of the laws." (Pet. p.20) First, the Railroad never made that argument previously in this case. This Court will not consider an argument advanced for the first time in the petition for certiorari. *Kurth Ranch,* 113 S.Ct. at 1942 n.9. Moreover, the Railroad is not being treated differently than any

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[4] Even if there was a conflict between decisions rendered by the Tenth Circuit, it would not be a sufficient basis for granting a writ of certiorari. *See Davis v. United States,* 417 U.S. 333, 340 (1974). Such differences normally are resolved by the Court of Appeals itself.

other railroad which has been held liable in an FELA action for injuries caused a worker who receives RRA disability benefits. No railroad employer is permitted to reduce the compensation owed an injured employee by the amount received by the worker from the collateral source of RRA benefits.

4. The Tenth Circuit's conclusion that the error here was prejudicial is consistent with every circuit court decision which has addressed the issue. Moreover, a harmless error analysis relating to an evidentiary issue is not a subject which warrants certiorari review.

The Railroad claims that the decision of the Tenth Circuit finding reversible error is inconsistent with "the decisions of other circuits, and the decisions of this Court." (Pet. p.21) That claim simply is not accurate. This Court and every circuit court of appeals that has addressed the question have concluded it is prejudicial for a jury to hear evidence of collateral source payments in an FELA action.

In *Tipton*, 375 U.S. at 36-7, this Court rejected the argument that admission of evidence of other compensation benefits was harmless error. As explained in *Reed*, 939 F.2d at 134, the *Tipton* Court did not "limit the application of the collateral source rule to the damage phase of the trial and noted that the jury was led to place undue emphasis on the compensation benefits in determining a liability issue." More recently, the Fifth Circuit in *Phillips*, 953 F.2d at 929-30, rejected the defendant's argument that the erroneous admission of such evidence was harmless error since the jury returned a verdict of no negligence,

even though the court recognized that evidence of negligence was "slim."

> It is undoubtedly true that knowledge that an injured plaintiff has resources available to compensate him for his loss, separate from the defendant, may divert the jury's attention from its narrow task of determining whether the defendant was negligent. The jury may feel that awarding damages would overcompensate the plaintiff for his injury (even though the defendant would only pay once), and may factor this into the liability calculus. This concern compels us to reject [defendant's] suggestion that, even if introduction of evidence of post-accident benefits was error, it had no effect on the jury's finding of no negligence and therefore constituted a form of harmless error.

See also Doucet v. Gulf Oil Corp., 783 F.2d 518, 523 (5th Cir.), *cert. denied*, 479 U.S. 883 (1986) ("[E]ven an argument by counsel that the plaintiff in a tort suit will receive workers' compensation is so prejudicial as to warrant a new trial. . . . ").

The court in *Sheehy*, 631 F.2d at 652-53, agreed that the mistaken admission of evidence of other compensation benefits was reversible error in a FELA action where the jury returned a verdict for the railroad, even though the trial court attempted a limiting instruction. As the Court explained, "the verdict could very well have been adversely affected . . . since the plaintiff recovered nothing." *See also Wilcox*, 747 F.2d at 1061-62 (new trial awarded after the jury returned a verdict for the railroad because the trial judge informed the jury that plaintiff

had received payment for medical expenses and "last time worked").

In *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir.1986), the Fifth Circuit concurred that the introduction of evidence of collateral benefits is not harmless. As succinctly summarized by the court, "because juries will be more likely to find no liability when they are aware that the plaintiff has already received compensation," the receipt of such evidence is reversible error.[5]

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[5] The Tenth Circuit discussed most of these cases in reaching the conclusion that the error in this case was not harmless. 59 F.3d at 1033-34 (Pet. App. pp.9a-11a).

CONCLUSION

The decision by the Tenth Circuit is in accord with *Eichel* and with the many other circuit court decisions which have addressed the same issue. Since there is no conflict with this Court or other circuit courts of appeals and no compelling argument has been presented that *Eichel* should be overruled, no reason exists for this Court to grant certiorari under Rule 10. The Railroad's petition should be denied.

Dated: October 31, 1995.

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No. 95-530

In The

Supreme Court of the United States

October Term, 1995

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

KARL W. GREEN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO NEW POINTS RAISED BY RESPONDENT

This reply brief addresses the points raised by Karl W. Green in his brief in opposition to The Denver & Rio Grande Western Railroad Company's ("D&RGW") Petition for a Writ of Certiorari. This Court's consideration of the issues that would be considered on an appeal to this Court are important not only to D&RGW and all other railroads and railroad employees in this country, but many other litigants in federal and state courts where the applicability of the collateral source rule is at issue as well as litigants before federal appellate courts where the issue is the prejudicial effect of evidence admitted at trial. This reply brief is necessary to clarify misrepresentations and even misstatements contained in Mr. Green's brief.

I.

CERTIORARI SHOULD BE GRANTED TO OVERRULE *DICTA* IN *EICHEL* THAT NEITHER THIS COURT NOR ANY CIRCUIT COURT HAS FULLY ANALYZED AND CONSIDERED.

Mr. Green argues that *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) should not be overruled. However, rather than stating any reason why *Eichel* should remain good law, Mr. Green argues that the D&RGW has failed to present any compelling argument why it should not. Mr. Green's argument underscores the most compelling reason why certiorari is necessary in this case.

D&RGW seeks certiorari so that this Court can fully consider, for the first time pursuant to the adversarial process, an issue that was discussed by the *Eichel* Court only in *dicta*

but never was fully briefed nor argued because it was conceded by the parties in that case. D&RGW seeks to have this Court consider and decide whether Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* ("RRA"), disability benefits, paid to an injured railroad employee, are not from a collateral source so that the amount of these benefits can be used to offset damages in that employee's action against his employer under the *Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.* ("FELA").

Mr. Green's argument assumes that the *Eichel* Court considered this issue and made its statement in *dicta*[1] against such an offset for valid reasons. It did not. Moreover, the circuit courts also have disallowed any offset solely because of the *dicta* in *Eichel*, and not because of any independent analysis or valid reason supporting such a conclusion. As did the Tenth Circuit below, these courts have believed they were so compelled to follow the *dicta* of the *Eichel* Court that none of them have considered the underlying reasons for and against the statement made in *Eichel*. The refusal of any appellate court to fully and carefully consider this issue is compelling reason,

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[1] The Tenth Circuit did in fact, as Mr. Green suggests, say that this *dicta* in *Eichel* "was necessary to the holding that *admission of* evidence of those [RRA disability] payments to prove malingering was *not harmless*." (App., D&RGW's Petition, p. 9a, emphasis added.) However, both the Tenth Circuit and Mr. Green err in that the *Eichel* Court did not hold that admission of any evidence was not harmless. Since, in *Eichel*, the evidence of the RRA disability benefits never was admitted, the *Eichel* Court merely held that the *exclusion* of such evidence was *not harmful*, and specifically upheld the trial court's ruling because the probative value of such benefits to prove malingering was outweighed by the potential for prejudice when other evidence of malingering was available that would be more probative. *Eichel* at 255. (App., D&RGW's Petition, p. 24a.) Hence, clearly the *dicta* of the *Eichel* Court regarding the defendant's concessions that it could not have an offset for such benefits paid to the plaintiff is in fact pure *dicta* that is superfluous to the actual holding of the *Eichel* Court.

in and of itself, for this Court to grant certiorari in order to consider this important question of federal law.

Moreover, there are compelling reasons why this Court, after fully and carefully considering this issue, should correct the *dicta* it previously made in *Eichel*. RRA disability benefits are funded by substantial employer contributions.[2] Such a fact is critical in determining that such benefits are not from a collateral source. *Mays v. United States*, 806 F.2d 976, 977 (10th Cir. 1986); BLACK'S LAW DICTIONARY 262 (6th ed. 1990). In addition, as discussed in D&RGW's Petition, there are compelling public policy reasons for allowing such an offset which Mr. Green did not even address and which will not be restated here.[3] Significantly, Mr.Green did not provide any reason to conclude that a denial of such an offset is necessary

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[2] Federal law requires D&RGW to pay into the RRA disability fund. A complete discussion of the significant amounts paid into this fund by all railroad companies is set forth in the Brief of Association of American Railroads as Amicus Curiae in Support of Petition which has been filed in this matter.

Mr. Green seems to imply that this Court reached the contrary conclusion, that RRA disability benefits are not from contributions of employer railroad companies, because of the *Eichel* Court's reference to *New York, New Haven & Hartford Railroad v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953). The *Leary* case is discussed by D&RGW in its initial Petition at pages 9-10, and it clearly does not hold that railroads do not contribute to the RRA disability fund nor could it invalidate this fact; a fact which never has been denied by Mr. Green.

[3] In summary, the continuing validity of the collateral source rule, especially in factual situations presented by the facts of the instant case, is under critical attack. This argument was made before the Tenth Circuit and is properly brought here since the collateral source rule is a judicial rule of public policy that should not be allowed to continue without valid reasons. (See authorities cited in D&RGW's Petition pages 14-15 and notes 6 and 7.) Hence, in

to achieve any valid objective. The denial of the offset merely provides a windfall to railroad employees while their employers end up paying twice.

Clearly these facts present compelling reasons for granting certiorari in order for this Court to fully consider the important federal question of whether offsets should be allowed for employer funded RRA disability benefits in FELA cases.

II.

CERTIORARI SHOULD NOT BE DENIED MERELY BECAUSE CIRCUIT COURTS HAVE CONSISTENTLY FOLLOWED THE *DICTA* IN *EICHEL*, AND CERTIORARI SHOULD BE GRANTED BECAUSE OF THE INCONSISTENCY IN SIMILAR HOLDINGS OF THE TENTH CIRCUIT.

Conflict in circuit court decisions certainly has been expressed by this Court to "indicate the character of the reasons the Court considers" when reviewing a petition for writ of certiorari. SUP. CT. R. 10. Never, however, has this Court stated that certiorari would be denied simply because circuit court decisions were consistent. Such a rule would ignore situations, such as now before this Court, where the circuit court decisions are not based upon analysis or reasoning derived from the adversarial process.

The very fact that circuit courts, as did the Tenth Circuit in the instant action, consider themselves compelled to adhere

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addition to considering the federal question of whether RRA disability benefits are from a collateral source in an FELA action, this Court should consider the continued viability or scope of the collateral source rule.

to mere *dicta* without any independent analysis is reason why this Court should grant certiorari. A review of the cases cited by Mr. Green, and D&RGW, reveal that it is necessary for this Court to be fully briefed and carefully consider the important federal question of whether RRA disability benefits funded by railroad defendants should be offset against damage claims. This Court should grant certiorari to decide this issue directly through the adversarial process since because of the *dicta* in *Eichel* no other appellate court will.

In addition, Mr. Green's argument overlooks the inconsistency in the Tenth Circuit's own decisions. In *EEOC v. Wyoming Retirement System*, 771 F.2d 1425 (10th Cir. 1985), for example, the Tenth Circuit allowed an offset to damages by the amount of social security retirement benefits the claimants received, where both the claimants and defendant contributed to that fund, noting that the claimants would not have received those benefits had they not been wronged by the defendant.[4] Railroad employees do not receive social security; they receive similar benefits under the RRA. Mr. Green, in the instant action, received RRA benefits, where both he and the D&RGW contributed to the fund from which the benefits were paid, and he clearly would not have received those benefits had he not been disabled. However, the Tenth Circuit denied D&RGW the same offset it gave to Wyoming Retirement System.

The only reason the Tenth Circuit has discriminated against D&RGW is because it believed it was compelled to

[4] This case is not distinguished simply because it did not involve a jury trial. Mr. Green did not have to involve the jury in making the required offset in the case at bar. He chose to do so against the admonition of the trial court. If there is a distinction, it was caused by Mr. Green refusing to follow the advice of the trial court, and it should not operate to the detriment of D&RGW.

follow the *dicta* in *Eichel*. Moreover, just because all railroads will be treated alike, as Mr. Green argues, is not a reason to support their being treated worse than other employers.[5] There is no reason to treat railroad employers differently than other employers when it comes to protecting them from having to pay twice for an employee's damages. Certiorari should be granted to correct the inconsistency in the Tenth Circuit's decisions, and the discriminatory effect it has on D&RGW in this case.

III.

THE TENTH CIRCUIT'S DECISIONS WERE NOT INCONSISTENT UNTIL ITS DECISION IN THE INSTANT ACTION.

Mr. Green complains that D&RGW did not previously argue that the Tenth Circuit's decision is discriminatory. Obviously, D&RGW could not make this argument until the Tenth Circuit discriminated against D&RGW with a decision that is inconsistent with its previous holdings for non-railroad employers. There was no inconsistency, and no discrimination, until the Tenth Circuit rendered its opinion in this case. In fact, the trial court expressly relied upon the Tenth Circuit's prior decisions in determining that it was within its discretion to allow the offset. (App., D&RGW's Petition, pp. 19a-20a.) The trial court assumed the Tenth Circuit would treat railroad employers in a manner consistent with the way it had treated the non-railroad employer in the *EEOC* case. *Id.*

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[5] Mr. Green's argument leads to the analogous, and obviously improper, conclusion that discrimination against, for example, women or blacks is acceptable because at least all women and blacks will be discriminated against equally.

Neither, *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 113 S.Ct. 1937, 1942 n.9 (1994) nor *Davis v. United States*, 417 U.S. 333, 340 (1974), cited but not explained by Mr. Green, restrict D&RGW from pointing out the discriminatory effect of the Tenth Circuit's opinion below as a reason for this Court to grant certiorari in order to review that opinion. *Cf. United States v. Cretacci*, 62 F.3d 307, 310 (9th Cir. 1995).

IV.

THE ISSUE OF WHETHER RAILROAD DISABILITY BENEFITS SHOULD BE ALLOWED TO OFFSET CLAIMS OF LOST WAGES IS RIPE FOR REVIEW BY THIS COURT.

Mr. Green makes the off handed comment in point 2 of his brief that the issue of whether RRA disability benefits may offset damages is not presented by this case. This statement simply is untrue. This issue was the subject of Mr. Green's motion in limine before the trial court and it was the principal point argued before the Tenth Circuit.

Mr. Green filed a motion in limine to exclude any evidence that would be offered to obtain an offset for the RRA disability benefits he was receiving. The trial court, after independent research and arguments from both sides, denied the motion and held that such an offset should be allowed in order to avoid the injustice of D&RGW paying twice for Mr. Green's claim of lost wages and lost future earnings. The trial court held that the offset did not violate the collateral source rule, and allowed D&RGW to present evidence of such benefits if Mr. Green did not provide for the offset in his damages

evidence. Mr. Green appealed this ruling. D&RGW discussed this issue at length in Points II, III, and IV of its brief filed with the Tenth Circuit.

In light of the Tenth Circuit's reversal of the trial court's ruling and its holding that the submission of such evidence created prejudicial error for Mr. Green, it is beyond dispute that the issue of whether RRA disability benefits may offset damages is properly subject to review by this Court should it grant certiorari.

V.

CERTIORARI ALSO SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT'S METHOD FOR FINDING REVERSIBLE ERROR IS INCONSISTENT WITH OTHER DECISIONS OF THE TENTH CIRCUIT, OTHER CIRCUITS AND THIS COURT.

Mr. Green focused only on the actual *holdings* of the Tenth Circuit and other circuits in their prior decisions, and of this Court in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), and not on the unique facts and analyses that supported those holdings. The holdings may be the same, but the analyses the Tenth Circuit used in this case to reach the same conclusion is not. Consequently, Mr. Green has not, nor can he, refute the point that other courts, including this Court in *Tipton*, have analyzed the facts from which they found there to be error and concluded that a substantial right of the complaining party was prejudicially affected. The Tenth Circuit's decision in this action, holding that "reversible" error exists as a matter of law just because of the error, is inconsistent with the law and reason, and should not be allowed to stand.

Moreover, any such per se rule of reversible error would create injustice. Prejudice, or lack thereof, should be determined on the basis of the facts and should not be presumed. In the instant case, the facts that Mr. Green himself introduced the error,[6] that it was not emphasized nor discussed by D&RGW, and that Mr. Green's introduction of the error was innocuous are important and should be considered in determining whether there was prejudice to Mr. Green. In addition, error itself also should be determined from an examination of the facts to evaluate whether there are other reasons for supporting the evidence so that its admission would not be in error. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *United States v. Flower*, 29 F.3d 530, 536 n.9 (10th Cir. 1994). For example, in the case at bar, D&RGW argued below that evidence of Mr. Green's receipt of RRA disability benefits was not error but was necessary to clarify Mr. Green's evidence of loss of future RRA retirement benefits. *Moore v. Missouri Pac. R.R.*,825 S.W.2d 839, 842-43 (Mo. 1992). The Tenth Circuit ignored all of these facts and failed to even consider whether in fact there was error, even if the trial court was wrong regarding the offset, and then whether any such error was prejudicial to Mr. Green.

Mr. Green has not refuted D&RGW's point that the Tenth Circuit failed to analyze the specific facts of this case in determining that there was reversible error. The Tenth Circuit's failure to do so is in direct conflict with how this Court determined there to be error that was harmful in *Tipton*. The

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[6] Mr. Green seems to take comfort in the fact that before he introduced evidence of his receipt of RRA disability benefits he preserved his objection to the trial court's ruling. However, the fact that he preserved his objection does not relieve him of the effects of his conduct in introducing that evidence when the trial court counselled him not to and provided to him an option that would have prevented the jury from ever hearing such evidence.

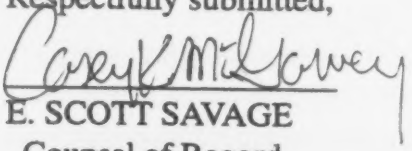
rendering of an opinion that is inconsistent with an opinion of this Court certainly is a compelling reason to grant certiorari. The necessity of granting certiorari is even more compelling because the issue of when an appellate court may find reversible error has widespread applicability to all types of cases where error from the admission of evidence is claimed on appeal.

CONCLUSION

Compelling reasons exist for this Court to grant certiorari in order to review the important federal questions and questions of public policy and appellate review that arise from the Tenth Circuit's opinion below. Determination of the issues presented by this appeal to this Court would greatly clarify presently unreasoned areas of federal law and public policy, as well as promote consistency in the Tenth Circuit and among the circuit courts. D&RGW's petition for a writ of certiorari should be granted.

DATED this 9th day of November, 1995.

Respectfully submitted,



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